The Norwegian Model for Access to the European Financial Markets: The Principles and Practicalities of the EEA States’ Solution to the Passporting Issue in Light of Brexit

by

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1. Introduction

Ever since the UK decided to leave the European Union (EU), there has been constant discussion regarding the alternatives for the UK’s financial sector in its continued dealings with the European market. One of the many scenarios that have been launched is that—for a shorter or longer time—the UK remains in the European Economic Area (EEA). Prematurely dismissed by many commentators and pundits because of non-voting representation in important forums, the EEA nevertheless presents itself as a viable alternative for the UK, at least considering the alternatives. Although the EEA States' do not get to

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1 In this article, ‘the terms EEA States’ and ‘the EFTA States’ are used interchangeably to designate Norway, Iceland, and Liechtenstein, with full knowledge that ‘EEA States’ is normally meant to cover all parties to the EEA Agreement, and that the EFTA States also include Switzerland, who is not a member of the EEA. Also, I speak of the EU ESAs, but
vote, they influence policy, and receive market intelligence and other benefits that are denied to other non-EU members.

And there are few alternatives for the UK’s financial sector if the UK wishes to gain access to the Single Market post Brexit. The EU recently rejected many of the alternatives that the UK still seem to hedge its bets on, when it finally granted Norway permanent access to the markets. Judging from that experience, the EEA solution is the least unrealistic of the UK’s options. This article attempts to explain both the obstacles to many of the alternative arrangements and the advantages for the UK of joining the EEA. The short answer is that the prospects for a bespoke agreement on financial services seem dim, mainly because the EU and its agencies have evolved into a legal structure that make exceptions and special treatment cumbersome, if not downright impossible. In addition, the UK should be careful in settling for simplistic “rule taker, not rule maker”-talk, as the relationship between the financial authorities is much more complex than that. There is a vast difference between not getting to vote and not getting to make the rules.

Section 2 argues that the basic problem facing any non-EU member that attempts to gain access to the financial markets in the EU is not primarily related to political or economic leverage. There are simply too many legal obstacles in the way of a workable bilateral solution. For the past eight years, the EU has been infusing financial market regulation with semi-constitutional thinking through the ramping up of its supervisory structure. In this context, the power to oversee national authorities is a vital and integral component of the structure. This structure is the biggest obstacle to a bespoke arrangement, as it relies on everyone being on equal footing, to borrow an expression from the market abuse regime. In this section, I highlight the the core issues of such an arrangement, namely, the entire regulatory structure that the EU has erected since 2010, which depends on supranationality and the supervision of national supervisors to such a deep extent that it makes little sense if exceptions are granted.

Section 3 gives an overview of the specific legal reasons why the EU—through the functions and powers of the financial supervisory agencies—had difficulties in granting Norway a bespoke arrangement. I also describe the rudiments of the two-pillar structure with the EU and the EFTA. It took Norway, and subsequently the two other non-EU members of the EEA area, six years to gain permanent access to the financial markets on a secure and predictable basis. This experience teaches a lesson that the UK might want to listen to.

confine myself to discussing ESMA in particular, since ESMA is the agency with the most far-reaching competence at the moment.
Section 4 forms a conclusion regarding what the UK stands to gain by joining the EFTA system, with an emphasis on passporting rights and representation in crucial rule-developing meetings, while it also highlights the shortcomings of the present system.

2. **Fitting in, not bargaining in**

The dominant sentiment—and not only in the UK—seems to be that the UK can somehow strike a deal, be granted a bespoke arrangement as it is often referred to, due to its importance to the global financial markets. This is understandable. The UK is, according for the Global Financial Centres Index 22, at the top when it comes to delivering high-quality financial services. Frankfurt, a candidate for taking over UK business if the UK does not gain considerable access to the Single Market, ranks at 11, with Luxembourg at 14 and Amsterdam far below at 33. In other words, there is no reason why the City should not be a vital player in the EU markets going forward, not only due to its market size but also because of regulatory expertise and sophistication. For example, Georg Ringe has argued that the Brexit will smoothen itself out, somehow, due to the size of the economic and political factors at stake, claiming that “the EU financial services framework repeatedly sees a victory of politics or economics over the law – that is, formal legal problems or structures are brushed aside when political necessities or economic exigencies so require.” Ringe bases his argument on the fact that the history of EU financial regulation is ripe with exemptions, as well as on a belief that the magnitude of the consequences for both sides will by necessity lead to special deals. Granted, there are exemptions, and important ones at that. But this time around it requires setting aside what the EU has been doing since 2010 withing financial regulation. Since 1) the EU recently turned down any special deals, or bespoke arrangements for the EEA EFTA countries, and 2) that all the

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3 See Wolf-Georg Ringe, ‘The Irrelevance of Brexit for the European Financial Market’, in *European Business Organization Law Review*, 2018:1-32, at 1. For a Norwegian observer, knowing that he is coloured by his country’s recent experiences in trying to attain special deals, the “prediction ... that the EU27 will most probably jump over its shadow and grant the UK yet another ‘special treatment’” (2018:16) looks a bit more shaky, even though the two countries are incomparable in influence. I will not, however, completely rule out the prospects of a special deal, but such a deal will have to take into consideration the arguments ventured in this article.
reasons for the supranational orientation within financial supervision must be
discarded. This article argues that getting access to the Single Market within the
area of financial services is not primarily a question of market size, desirability
and bargaining with political interests. It is a question of fitting into a legal
system with semi-constitutional traits.4

Following the UK’s secession from the EU, Norway and the UK will have
more in common vis-à-vis the EU’s financial markets than meets the eye.
Trivially, they are both non-EU members. However, the reason that their
access to the markets is challenging is also the same: constitutional and popular
political problems with allowing an institution to which they do not belong to
exert sovereignty on their own soil. The issue is not related to tying themselves
to making and having the same set of rules. Norway was—as the UK presum-
ably will be—in relatively full compliance with the substantive financial mar-
kets directives and regulations judging from the signals in the Great Repeal
Bill5. The possibility of satisfactory access to the EU’s financial markets, in
other words, does not depend on the extent of the similarity of rules. Judging
from the recent experience of the EEA States grappling with the same problem
as the one that the UK will face—getting into the single financial market—the
key is the acceptance of the 2010 Regulations for the European supervisory
superstructure. These regulations contain provisions that are vital for the
present system of financial regulation in the EU. Some of these provisions also
create problems of sovereignty that have been constitutionally challenging for
the EEA states to accept—and will be equally hard for the EU to give up on in
negotiating with the UK.6

4 See Thomas Burri and Benedikt Pirker, ‘Constitutionalization by Association? The
Doubtful Case of the European Economic Area’,(2017) *Yearbook of European Law*,
207–229, analyzing the EEA institutions against the background of constitutional EU
literature. The authors find that ‘there are a number of constitutional functions present in
substantive EEA law which have been transposed from the EU legal context; but, ... there
are also institutional limitations of the EEA which lead to the conclusion that EEA law is
hardly constitutionalized at all’. I agree with this, partly because it seems to be a correct
assessment that the institutions in general lack important constitutional functions, and
partly because the recent development of the supranational aspects of the supervisory
system is based on the idea of potentially sidelining national authorities to a much greater
extent than has previously been done. The main point, however, is that the present system
seems, to an increasing extent, to function according to higher-order rules that disallow
exemptions based on political expediency or desirability.

It must be noted here that the article dates to 2013, in other words, before the 2014 EEA–
EU agreement on the two-pillar system is considered.

5 European Union (Withdrawal) Bill. HL Bill 79 – EN.

6 For another argument in favour of the UK joining the EEA, see Francisco de la Peña,
‘Gentle Brexit, a very British Exit: EEA Membership as the Most Favourable Model to
2.1. The 2010 Regulations and their supranational structure

Before the 2010 Regulations and the creations of the EU ESAs, incorporating EU legal acts within the financial markets area did not pose any specific legal problems, as these acts did not confer any constitutionally problematic regulatory power to the supervisory agencies. Due to specific legal problems, the EEA EFTA States could not, however, incorporate those legal acts in these regulations that contained supranational supervisory powers.

There are four regulations that form the basis of the regulatory superstructure in the EU, following the financial crisis in 2008–2009. These regulations (referred to collectively as ‘the 2010 Regulations/the Regulations’) establish the European Surveillance Authorities (the ESAs), The European Banking Authority (EBA),7 The European Insurance and Occupational Pensions Authority (EIOPA),8 the European Securities and Markets Authority (ESMA)9 and The European Systemic Risk Board (ESRB).10 Common to the 2010 Regulations is that, in addition to establishing a new system of financial supervision, they contain important clauses conferring power from the supervisors of the individual member states to these central supervisory bodies.

The Regulations establishing EBA, EIOPA and ESMA share a common structure, in the sense that the identical Articles 17, 18 and 19 in all the Regulations have the same effect: granting of significant powers to intervene in national markets and to sideline national authorities. Moreover, it is these very articles, together with other legal acts that refer to Article 9.5 in the Regulations, that constitute the crux of the case.11 These articles represent an obstacle to any non-EU member with a constitutional or political structure that forbids it from accepting foreign jurisdiction on its soil.12

According to Article 1.5, the purpose of the Regulations is to contribute to ‘the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses’. More specifically, they seek to improve the functioning of the internal market, secure the integrity of the financial markets, strengthen international coordination, prevent

11 See section 2.2 below.
12 For the Norwegian constitutional perspective, see section 3.1 below.
regulatory arbitrage, secure sufficient supervision of investment and other risks and enhance investor protection.

Against this background, Articles 17–19 give the respective ESAs the right to intervene in the markets of the member states when certain closely defined conditions are met. For example, Article 17 empowers the relevant ESA to instruct the market institutions directly if the national supervisor does not conform to EU law. The scope of Article 17.1 is defined by reference to Article 1.2, which includes, among other things,

- Directive 97/9/EC (Investor Compensation Schemes)
- Directive 98/26/EC (Settlement Finality)
- Directive 2001/34/EC (Listing)
- Directive 2002/47/EC (Financial Collateral)
- Directive 2003/6/EC (MAD)
- Directive 2003/71/EC (Prospectus)
- Directive 2004/39/EC (MiFID)
- Directive 2006/49/EC (Capital Requirements)
- Directive 2009/65/EC (UCITS)

This means that in case of any failure to apply ‘the acts referred to in Article 1 (2)’, or applying them ‘in a way which appears to be a breach of Union law’, cf. Article 17.1, the EU ESAs are granted interventionist powers, according to the process stipulated in the remainder of the Article. These powers include the following:

without prejudice to the competence of the European Supervisory Authority (European Banking Authority) in terms of prudential supervision, any future legislation in the area of Alternative Investment Fund Managers (AIFM), and Regulation (EC) No 060/2009, and, to the extent that these acts apply to firms providing investment services or to collective investment undertakings marketing their units or shares and the competent authorities that supervise them, within the relevant parts of, Directive 2002/87/EC, Directive 2005/60/EC, Directive 2002/65/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.

By this last addition, directives and regulations such as Markets in Financial Instruments Regulation (MiFIR), are included as power-conferring rules

13 Regulation (EU) No 00/2014.
from the national authorities to the central European supervisor. According to Article 17.4, if the national supervisor does not comply with the opinion of the central supervisor within one month of receiving the formal recommendation to remedy what ESMA considers a breach of Union law, ‘the Commission may, after having been informed by the Authority or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law’. In cases where the national supervisor refuses to comply or change a practice that the EU ESA considers to be in breach of any applicable rule, the ESA has, according to Article 17.6, the right to instruct the financial institutions in the relevant market directly, thus sidelong the national supervisor.

Before 17.4 is triggered, however, the EU ESA issues only recommendations directly to the national supervisor, informing the supervisor of its view and what the alleged breach of Union law consists of. This is an especially important dimension to the logic of this article when applied to the EEA EFTA States since, given that the communication involves only recommendations, there is no supranational aspect at play. On the supervisory level, supranationality first appears when the EU supervisors require conformity. This does not mean, however, that Articles 17.2 and 17.3, outlining the non-binding dialogue, lack potency. Once the EU ESAs initiate procedures according to Article 17.1, the national supervisor has no other choice than to comply, as Article 17.4 will undoubtedly be triggered in the event of continued non-compliance or a lasting divergence of opinions as to what constitutes the breach. Article 17, therefore, contains a two-track system, which taken together amounts to a relatively potent control system by the EU ESAs over the national supervisors.

What is common to Articles 17–19 in the Regulations is that they enable the ESAs to make decisions that are directly binding upon the financial market participants, thus bypassing the national supervisors. In times of emergency—defined as ‘adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union’—Article 18 short-circuits the procedure laid down in Article 17 and confers rights on the ESAs to swiftly intervene, facilitate and coordinate the actions taken by the national supervisors and authorities—in other words, to take control of the national markets. If those actions are insufficient or inappropriate according to the ESAs, Article 18.4 empowers the relevant ESA to sideline the national authorities and issue decisions that are directly binding on the market participants. Article 19, a seemingly unproblematic provision about settlements of disagreements between national authorities in different member states, does, however, contain a provision (19.4) about the powers of ESAs to settle such disagreements as well as corresponding powers to instruct the national market participants in the
case of non-compliance by the authorities. There are also other provisions in the 2010 Regulations that build on a one-sided competence from the EU, such as peer review of the national supervisors by the ESAs (Article 30) and a duty to provide information (Article 35).

Granted, these are highly specialised and, hopefully, rarely applied provisions. Given that these Articles are so carefully defined and limited to special circumstances, they should pose no practical problems for the national supervisors in their normal practice and supervision of the financial markets. As such, they are a prime example of excellent legislative drafting, clearly defining the circumstances they apply. However, what they do pose, if applied to EEA financial supervisors and institutions under an extended EEA Agreement, are constitutional questions, as this would amount to a secession of sovereignty from a nation state that is not a party to the Treaty for the European Union (which was particularly worrisome for Norway, as a dualist legal system where decisions made by the CJEU have no binding effect).

Jörn-Axel Kämmerer sums up the ESAs role of being ‘meta-supervisors’ nicely, pointing to three specific functions:

(1) mere tutelage (‘watching the watchers’, that is, the NCAs) through soft law such as guidelines;
(2) involvement in the making of so-called tertiary law – ‘technical’ standards on market rules but also practices of supervision that are formally endorsed by the Commission but drafted by the ESAs; and (3) interference in an emergency, either through binding instructions to the national authority of a Member State (for non-compliance) or several States (in disagreement) or, as a last resort, though disempowerment of a national authority in an individual case. In other words, an ESA then replaces a NCA and takes the decisions in its own name.14

These are not weak powers and functions.

2.2. Other regulations with supranational implications

The 2010 Regulations are, however, not the full story of supranationality. In the Regulations, there is a specific Article, 9.5, which has a somewhat different function from Articles 17–19. Article 9.5 prescribes in which situations and how the ESAs can intervene in the member states’ markets. This intervention can either occur through imposing restrictions a certain financial institution or by prohibiting the distribution of financial products, given that these are regarded as threatening to the integrity and stability of the financial markets.

This competence applies partly in states of financial emergency, as defined in Article 18, and partly in circumstances where the member states through other, specifically defined legal acts have transferred competence to the ESAs to make such decisions. These legal acts are defined as those included in Article 1 (2) of the Regulations, to which Article 17.1 also refers.

In other words, Article 9.5 is dynamic, and whether it applies depends on the extent to which other legal acts refer to it. For example, Article 40.1 of MiFIR empowers ESMA to, ‘in accordance with Article 9 (5)’ of the 2010 Regulation to temporarily forbid or restrict marketing, sale and distribution of financial products or practices, in specifically defined situations and according to certain procedures’. Further, Article 40.7 states, ‘Actions adopted by ESMA under this Article shall prevail over any previous action taken by a competent authority’. Provisions such as this one are just as important to the EU supervisory structure, as they are constitutionally problematic for non-EU members to accept.

An example can illustrate the practical dimension of this structure: One of the key motivations behind the overhaul of the Credit Rating Agency Regulation that was adopted in 2009 was the view that the fragmented country-by-country supervision of the agencies was insufficient for systematic reasons. Therefore, CRA II transfers the competence to authorise and supervise such agencies to ESMA. As Preamble 6 states, ‘ESMA should be exclusively responsible for the registration and supervision of credit rating agencies in the Union’. According to Article 23d, ESMA has the competence to conduct on-site inspections at the business premises of the rating agencies, at times even without notice. Ratings from credit rating agencies established in third countries can, however, be used in the EU if the relevant ratings are approved by a European agency or if the agency is approved by ESMA directly. In other words, the regulation of rating agencies causes sovereignty issues only for the EEA states that are not members of the EU, as being an EEA member is not regarded as being a third country. This means that the regime that exists for third countries is not an option for the EEA States, which must have their credit rating agencies apply for a license from ESMA through the EFTA Surveillance Authority.

Given that the backdrop to the 2010 Regulations was the financial crisis, discussions about the regulatory and supervisory superstructure have had a theoretical flair about them. While important enough, the structure has raised more academic concerns about integration than worries about the day-to-day

17 For this process, see section 3.3.2 below.
management of the national competent authorities. Recently, however, we have seen signs that ESMA is willing to employ its supranational powers and directly regulate the national markets. In 2013 and 2016, ESMA issued warnings about the proliferation of Contracts for Difference, binary options and other speculative financial products, claiming that, as a rule, they are unfit for the retail market. Apparently unsatisfied with the effects of its warning, on 27 March 2018, ESMA adopted two measures invoking MiFIR Article 40 (cf. 2010 Regulation Article 9.5), thereby intervening directly in the national markets by prohibiting these products.

ESMA launched this initiative a mere two weeks after MiFIR came into effect on January 3, 2018 in the form of its 18 January publication of the ‘Call for Evidence and Consultation Paper’. ESMA seems, in other words, ready, willing and able to exercise its powers, which speaks to the growing difficulties in suspending those specific powers for non-EU members.

According to EMIR, almost the same competences follow with regard to OTC clearing, central counterparties and transaction registers, also enjoying a third country regime if the regulation in such third country is regarded as being equivalent to that of EMIR (ref. Article 75). Although the task of supervision in these cases is placed upon the national supervisors, EMIR establishes a collegium of supervisors. This collegium has influence on the authorisation procedure, and in the event of a negative decision by the collegium to a national authority, ESMA decides whether authorisation can nevertheless be granted.

Equally relevant in this perspective is Article 47.4–6 in the Alternative Investment Fund Manager Directive, which, subject to Article 9.5 in the 2010 ESMA Regulation, empowers ESMA to request national supervisors to make certain decisions with regard to forbidding or restricting designated managed funds in the Union. There is no comparable equivalence procedure for funds under the Alternative Investment Fund Managers Directive (AFIMD).

Finally, and notably in this connection, there is Article 28.1 in the Short Sale Regulation, conferring power upon ESMA to, according to Art. 9.5 of the 2010 Regulations, require that physical and legal persons provide information

19 Regulation (EU) 648/2012.
20 Directive 2011/61/EU.
21 Directive 2011/61/EU. This does not mean, however, that a third country alternative investment fund cannot be marketed in the Union. It just means that such funds must follow a separate passporting procedure.
and publicise short positions. It can also directly forbid short selling or set conditions for the settlements of such positions. There is an applicable equivalence regime for this regulation, but its scope is highly limited, applying only to market-makers and to certain authorised primary dealers (cf. Article 17).

This provision warrants some discussion, especially in light of the constitutional or semi-constitutional aspects of the new financial regulatory architecture. It is also of special interest because the UK has previously challenged exactly the scope of competence that ESMA is granted according to Article 28 with regard to directly supervising national financial market participants. In Case C-270/12 United Kingdom v Parliament and Council (Short Selling Ruling), the UK challenged Article 28 of the Short Selling Regulation on four grounds of law, involving five issues: 1) that ESMA’s powers were too discretionary, 2) that ESMA was granted too many choices when imposing measures, 3) that the factors ESMA must take into account in deciding actions were too subjective, that, 4) although being temporary, there was nothing to exclude permanence and finally, and most importantly for our purposes, 5) that ESMA was conferred broad powers to implement policy in a particular case, conflicting with the structure of the TFEU, which only confers powers on the Commission, not further down.\(^\text{22}\)

The UK lost on all points, but the position of the Court on the last point is especially interesting, as it turned on a judicial review of legislation based on higher norms, claiming that the Parliament and the Council lacked legal competence to make such a law.

One of the main contentions by the UK was that Article 28 was in breach of TFEU Article 114’s requirement that the measures adopted by the European legislature had to have the establishment and functioning of the internal market as their object. According to the UK, Article 28 went beyond this mandate when it granted ESMA the power to intervene directly in the markets rather than confining itself to imposing obligations on the member states. Without arguing closely, the Court merely referred to the purposes and recitals of the Short Selling Regulation, finding that the Regulation satisfied 1) the requirements for approximation, that is, that the agency was entrusted with ‘discretion as regards the most appropriate method of harmonisation for achieving the desired result, especially in fields with complex technical features’ (para. 102), and 2) there was nothing in TFEU Article 114 that prevented the EU legislature from making laws that were not only binding on the states but

\(^{22}\) For a discussion of the case, see Elizabeth Howell, ‘The European Court of Justice: Selling Us Short?’, in European Company and Financial Law Review (2014:454-477), arguing that the CJEU effectively clears the path for ever more competences to the agencies.
also directed at certain products, general or individual (para. 106). Obviously considering the divergent supervisory practices of the member states leading up to the financial crisis, the Court stated that the purpose of TFEU Article 114 is to harmonise, through effective and proportionate measures, the internal market. Therefore, Article 28 of the Short Selling Regulation was considered to be appropriate in that regard. According to the Court, ‘the harmonisation of the rules governing such transactions is intended to prevent the creation of obstacles to the proper functioning of the internal market and the continuing application of divergent measures of the Member States’ (para. 114). Given that Article 28 refers to ESMA Regulation 9.5, this also means that the Court gave the EU legislator full protection when establishing the regulatory and supervisory superstructure. This indicates the importance and constitutional protection of Article 9.5 of the 2010 Regulations. As Niamh Moloney points out, although the case is framed by particular aspects of ESMA’s powers and competences according to a specific regulation, ‘a liberal reading might suggest that [the decision] has significantly stabilised ESMA’s constitutional basis’, adding that ‘[t]he ruling might also be read as suggesting a judicial sensitivity to the operational realities of supervisory decision-making and acceptance of the ESMA’s technical capacity’.  

An important aspect of this is that the supervisory structure, with all its recitals and statements about the necessity for strict oversight of the national controllers, has been interpreted as being perfectly in line with the TFEU, including the conferral of relatively broad discretionary powers. The significance of this reading, that is, of ascribing a constitutionally protected mandate to the ESAs, means that the task of bargaining it away becomes increasingly difficult. This case illustrates that the UK has already tried to limit the supranational powers of the ESAs. It lost then, and it has not increased its chances of winning since.

Such provisions involving questions of supranationality tend to be overlooked in debates and discussions about the prospective role of the UK vis-à-vis the European markets after Brexit becomes a reality, whether hard or soft. In the next section, we shall see that these provisions constitute a central element of the structure of the whole financial regulatory enterprise in the EU, to such an

25 It is also worth mentioning that in addition to the Commission, Spain, Italy, and France joined the Parliament and the Council in defending ESMA (and the whole structure) against the attempts by the UK to limit it.
extent that they can hardly be bargained away by a single country without undermining the entire regulatory endeavour since 2010. This does not solely involve worries over contagion, for example, that the EEA states will demand a new deal or that the German BaFin or the French AFM will not put up with being supervised while the FCA in UK gets a free pass. The problem is both conceptual and normative: Without these provisions—in other words, without supranationality—considerable portions of the entire EU regulatory enterprise post 2010 make little sense, as the structure depends on the very idea of harmonised control and supervision. While generous portions of EU work on financial regulation before the financial crisis focused on the development of material rules, much of the material regulation after the crisis has had a distinct compliance perspective. In addition to the 2010 Regulation, this implies that much of the regulatory endeavour targeted level 3, and to some extent level 4, in the Lamfalussy legislative hierarchy. The precise background for the heightened intensity of these levels was an impression by the EU that one of the vulnerable elements of the regulatory system was not the lack of clear rules but rather the lack of a shared common understanding of how to apply them. Specific topics of concern in this regard were the avoidance of regulatory arbitrage as well as favourable treatment of national financial champions. In other words, it was the lack of a harmonised supervisory system that provided the impetus for the revamping of the financial regulatory system in the EU. As Niamh Moloney argues, supervision, and the realisation that regulation has to be effectively enforced, has been the leading player in the EU’s regulatory efforts after the financial crisis.\footnote{Niamh Moloney, ‘Supervision in the Wake of the Financial Crisis’, in Eddy Wynnersch, Klaus J. Hopt and Guido Ferrarini (eds.) Financial Regulation and Supervision (Oxford 2012:71-111).} Aside from the structural reforms contained in the 2010 Regulations, a noticeable trend in EU financial regulation post 2010 is the growth of compliance rules in the central reforms, such as the Market Abuse Regulation, Markets in Financial Instruments Directive II and Markets in Financial Instruments Regulation. Tellingly, in the Market Abuse Regulation (MAR),\footnote{Regulation (EU) No 96/2014.} the central framework in the form of definitions and prohibitions remains virtually untouched. What is added are provisions regulating record keeping, red trading periods, Chinese walls, etc. Adding to this is the fact that the growth in compliance rules tends to imply more supervision.

While the content of the rules and their spirit are one thing, the greater sentiment surrounding the project in 2010 is another. Writing in 2011, Eilis Ferran prophesised that ‘the step-by-step assumption of supervisory responsibilities by bodies that have a pan-European remit that is now occurring at an
unprecedented pace is likely to lead eventually to the emergence of powerful European supervisory authorities.\textsuperscript{28} It seems, therefore, that it is issues of competence and jurisdiction of the European supervisors that the EU has invested most of its legislative prestige.

And this supervisory initiative seems only to be gaining momentum. Recently, the Commission has made financial supranational supervision one of its top priorities, in connection with the acceleration of the Capital Markets Union. As the Commission states in its press release, calling for a more potent and centralised European supervisor, ‘more needs to be done to enhance regulatory and supervisory convergence within the Single Market to help our financial markets work more effectively and to address new challenges’.\textsuperscript{29} According to this plan, the ESAs will determine what priorities the national supervisors are to act upon and actively monitor their compliance with centralised regulatory policy. In other words, powers are to be increased. So far this has been met with scepticism from the Council, but there is no doubt which way the wind is blowing. Along with enhanced powers come enhanced budgets, which are well described in a short statement from the Commission in the same press release: ‘Once adopted, the proposals will improve the mandates, governance and funding of the ESAs’. And as the Commission says in a recent Reflection Paper, proposing to amend the 2010 Regulations to further increase its competences, a more integrated supervisory framework ensuring common implementation of the rules for the financial sector and more centralised supervisory enforcement is key. As stated in the Five Presidents’ Report, the gradual strengthening of the supervisory framework should ultimately lead to a single European capital markets supervisor.\textsuperscript{30}

This initiative, which has evolved into a proposed regulation,\textsuperscript{31} includes calls for increased competences and measures to further coordinate supervisory


\textsuperscript{31} Se European Commission, Proposal for Regulation of the European Parliament and of the Council amending Regulation (EU) No 093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 45/2013 on European venture capital funds; Regulation (EU) No 46/2013 on European social
practice in the Member States. In addition, direct supervision of financial institutions and products will be transferred to ESMA. Notably, the current Board of Supervisors in the ESAs is also proposed to be replaced by more independent directors, further removing the ESAs from national control.\textsuperscript{32}

Although this initiative has been met with fierce political opposition, statements such as these do not indicate a regulator prepared to let national supervisors gain influence or, more relevant in this context, pave the way for bespoke arrangements involving considerable access but few responsibilities.\textsuperscript{33} On the contrary, the sentiment now is to accelerate discussions of true centralisation of financial supervision in the EU. The project is understandable, since for all its rhetoric of centralisation in order to increase homogeneity across the

\textsuperscript{32} As the Commission says in the introduction to the proposal: ‘More recently, the Commission Reflection Paper on the deepening of the Economic and Monetary Union suggests that a review of the EU supervisory framework – in particular of the European Securities and Markets Authority (“ESMA”) – should deliver the first steps towards such a single supervisor by 2019. The Reflection Paper also called for completing the Financial Union – comprising both a Banking Union and a Capital Markets Union – by 2019 so as to guarantee the integrity of the euro and improve the functioning of the euro area and the EU as a whole. Global financial markets are strongly interconnected, and the EU’s regulatory framework is largely based on international standards agreed in the wake of the financial crisis notably among G20 countries. As the EU is striving to accelerate the completion of the CMU, it is therefore essential that EU supervisory arrangements continue to develop in a manner which allows to reap the full potential of internationally integrated financial markets while ensuring that cross-border risks between the EU and the rest of the world can be monitored and managed effectively. The ESAs have a key role to play in this regard’.

\textsuperscript{33} Granted, initiatives such as these must be understood in light of Brexit, and suspicions that these are statements made with a view to strengthen negotiating positions, might well be in order. But, as Danny Busch has recently argued, the initiative to further centralise supervision stands on its own feet, especially within CCP clearing of OTC derivatives. That this is a sensitive topic in Brexit circumstances, goes without saying as most of the clearing is done in London. See, Danny Busch, ‘A Stronger role for the ESAs in the EU27’, in \textit{Capital Markets Union in Europe}, Danny Busch, Emilios Avgouleas and Guido Ferrarini (eds.), (Oxford 2018:28-54), arguing that despite enhanced powers on the books, the ESAs have been remarkably passive in using those powers, something which might be due to the Board of Supervisors being too much under the power of the interests of the national supervisors.
Union, the fact remains that the national authorities are still very much in control through the Board of Supervisors in the ESAs. And in such a scenario, suddenly granting special deals will undermine this momentum completely, as it will lose credibility.  

Put differently, the UK will, if Brexit becomes a reality, find itself in the same boat as Norway was in back in 2010, a boat that took six years to find its way safely to shore. For all the differences in bargaining power, the Norwegian experience attests to the legal difficulties of obtaining access to the EU financial markets without subjecting domestic markets to foreign control.

Hence, we shall look more closely at why and how Norway ended up with the two-pillar structure, with the EU on the one hand and the EFTA Surveillance Authority on the other. The purpose of this exposition is not to advise the UK going forward but to present the background and the essential elements of the two-pillar structure, along with its advantages and disadvantages.

3. The constitutional problem

Realistically, there are only two ways that non-members can access the European financial market: through equivalence or the achievement of passporting rights. The first option is available to so-called third countries, that is, states that have no treaty-based relationship with the EU. The second is reserved for EU members and EEA states that incorporate the clear majority of the EU directives and regulations into national law based on a binding agreement. This section looks more closely at the background of why it was essential for Norway— and the EEA states— to secure the passporting regime and not rely on third country equivalence status, and provides a description of the ensuing two-pillar structure.

34 As it now stands, it seems that the EU is planning for a financial structure that is an either/or: Either there is no Brexit or at least an EEA solution, or the UK is completely out. There will be no special deal.

3.1. The background—avoiding supranationality while gaining access

Based on popular referenda, Norway has turned down applying for membership in the EU on two occasions (1972 and 1994). Being located at the periphery of the European continent and having access to unparalleled natural resources in oil and fish, the Norwegian sentiment has been decisively in favour of national and independent rule. Adding to this is the country’s experience of 400 years of subjection to Danish rule, followed by almost 100 years of being in a union with Sweden, a union that was primarily dominated by Sweden, although Norway had its own government and constitution. Only 184 people voted no in the referendum concerning the dissolution of the union in 1905. Such historical experiences are key to understanding at least a portion of the Norwegian scepticism of continental rule, and the corresponding constitutional patriotism making it politically difficult to change the constitution to transfer sovereignty.

This background is important because a constitutional amendment would have solved the issue that instead took six years to bypass.\(^{36}\) However, proposing to amend the constitution to transfer significant amounts of power to an organisation that the Norwegian people had turned down twice would amount to political decimation for the ruling parties, regardless of political colour.\(^ {37}\) In other words, the situation is not very dissimilar to the conundrum that faces UK political leaders.

Since subjecting the national supervisors directly to the rule of the ESAs was regarded as politically infeasible or constitutionally difficult, the best option was to expand and utilise the existing EFTA pillar, and in particular the EFTA Surveillance Authority. By doing this, the EEA countries could argue that they could have their cake and eat it, too: They maintained sovereignty, while they gained access to the financial markets. Granted, this option did not include the right to vote, but that right was never theirs to begin with. And it came with a series of other advantages.\(^ {38}\)

Apart from the issue of sovereignty, a practical problem faced the national supervisors. Before the erection of the new financial regulatory architecture in 2010, Norway enjoyed full participation in the supervisory cooperation between the national supervisors of the member states, as organised by three committees of the forerunners to the present ESAs: CEBS, CEIOPS and CESR. Even after 2011, the Norwegian Financial Supervisory Authority par-

\(^{36}\) What that amendment would have looked like, is another (and difficult) question.
\(^{37}\) As an illustration, the negotiations were initiated by a government dominated by the Labour Party and concluded by a right wing-based one.
\(^{38}\) Of course, the set-up also has drawbacks, which will be discussed in sections 3 and 4.
participated informally as an observer on ESAs boards as well as in the forums where the rules are hammered out. This amounted to 200–300 meetings per year. Being forums for policy development and rule formation, it was a definite advantage for Norwegian supervisors and regulators to participate in these meetings. This enabled them to voice opinions and to understand the background for new regulation, as well as anticipating future developments. Additionally, it provided Norwegian authorities with vital information and intelligence about risks in the banking and finance sector in the EU. Although not being a member, and thus having no vote in the final rounds, the impression among central Norwegian regulators and supervisors was that influence was a matter of merit more than of status, hence giving Norway relatively important influence in the proceedings. However, continued participation in these important policy developing meetings depended upon Norway’s solution to the passport issue. Therefore, there were two reasons that a solution to the passport issue was deemed crucial for Norway, one being predictable and secure access to the financial markets, and the other being market, regulatory and supervisory intelligence from the ESAs. Equivalence, or bespoke arrangements, could not deliver on either of these issues, which—coupled with the constitutional issue at home—is why it took Norway six years to come to an arrangement. In those six years, the EU produced around 180 legal acts, most of which contain provisions that are closely related to the 2010 Regulations and the system that those regulations established. All these legal acts had to be incorporated into the EEA agreement before they could have effect in the domestic markets, and awaiting a solution to the passport issue, none of these acts were considered for implementation. Consequently, an ever-increasing gap between the regulatory state of play in the Union and in the EEA countries was developing. Granted, Norway had on its own initiative made some accommodations to the evolving EU regime, for example, by making its own law for alternative investment fund managers, which closely mimicked the AIFM Directive. However, this was, for reasons explained above, woefully insufficient to secure continued market access.

This did not only concern the (in itself important) issue of access to the financial markets in the EU; the very EEA agreement seemed to depend upon the EEA countries’ incorporation of the EU’s financial regulatory production into the EEA agreement. Only by incorporating the 2010 Regulations could the continued relationship between the EU and the EEA be secured. It would make little sense to continue with an EEA Agreement when one of the four freedoms was impaired.

We shall therefore take a closer look at the legal and practical dimensions of this two-pillar structure.

### 3.2. The background for the two-pillar structure

One of the early suggestions from the EEA side to the EU was, instead of granting the ESAs direct access to the EFTA markets, to utilise the existing EFTA system upon which the entire EEA cooperation is built. This structure is called the two-pillar structure, with the EU pillar on the one hand and the EFTA pillar on the other. Decisions in the EU do not have direct effect in the EEA countries, and they are binding only when the EEA committees incorporate them into the EEA agreement after considering them relevant for EU–EFTA cooperation, and national authorities incorporate them into their legal systems. This is the procedure for EU legal acts, but it could, Norway proposed, be tailored for the financial system. Thus, in 2012, Norway proposed that all 2010 Regulations should be incorporated into the EEA agreement, excluding the provisions that empowered the ESAs to have direct effect in national markets. This was unacceptable for the EU pillar for the reasons explained above, and it proved hard for Norwegian authorities to get the EU to engage in any continued dialogue on this premise. Who could blame the EU? After all, what Norway tried to achieve went—and to an increasing degree still goes—precisely against what the EU was and is trying to achieve: ever increasing centralised supervision and federalisation[^40] of the financial markets. It probably did not make things easier that this request came from a state that had turned down the EU twice but still wanted a better deal than the big member states.

Several other alternatives were proposed after the initial proposal. The Commission’s stance was that the ESAs should have equal competence in the financial markets of the EFTAs as they had in the markets of the individual member states of the EU. The EFTA alternatives were, *inter alia*, that the competence to make binding decisions directly over national financial market participants was to remain in the EFTA pillar, but supplemented with various forms of commitment on the state level. For example, the EFTA countries proposed that the competence to make decisions that are directly binding for national market participants should remain with the national supervisors, while various forms of commitments on state level decision-making competence should contribute to the very harmony that the EU model sought to

promote. The even included one alternative where the EU ESAs could make binding decisions, but the EFTA States could opt to follow them or not. In circumstances where the EFTA States opted for non-compliance, they could bring these decisions to a special EFTA appeal body, prospectively consisting of the same members as the EU Board of Appeals that handles complaints from the EU Member States. The purpose of this arrangement was to secure not only formal equal supervision but also the same mentality on the part of the supervisors and equal judicial review in the two pillars.

All the proposals to tailor a specific arrangement that did not include the EU ESAs having direct access to and control over the EFTA States’ internal markets in the specific senses outlined above were rejected by the EU. A central concern for the EU side was that the establishment of the three supervisory bodies within the financial markets was intended to place certain tasks on a supranational level to achieve a more harmonised regulation and supervision of the markets. This premise led to the present two-pillar system.

3.3. The two-pillar structure

3.3.1. The institutions

The finance ministers of the EU and the EFTA States reached an agreement on 14 October 2014, according to which the existing two-pillar system between the EU and the EFTA Surveillance Authority was ramped up and utilised for the purpose of subjecting to the EU ESAs without being formally and constitutionally bound to follow the EU side. In other words, formal constitutionality, reflecting the legal dualism of Norway and Iceland, was maintained.

The two-pillar structure is essentially the legal framework for the whole EEA Agreement. The structure is set up to reflect the institutions on the EU side,

41 Prop 100, p. 13.
42 Cf. 2010 Regulations, Art. 60.
44 Liechtenstein has a monist legal system.
45 For an extensive presentation and legal discussion of the articles in the EEA Agreement setting up the institutions, see Finn Arnesen, Halvard Haukeland Fredriksen, Hans Petter Graver, Ola Mestad and Christoph Vedder (eds.), Agreement on the European Economic Agreement (Oslo, 2018), esp. coments to Articles 89–114, as well as the comments to The Agreement Between the EFTA States on the Establishment of a
although there are (naturally) some important differences. The EFTA and EU pillars are described on the left and the right, respectively, with the Joint Committee and the EEA Council having representatives from both pillars in the middle. The novelty in the agreement, as will be described below, was the increased role and function of the EFTA Surveillance Authority, which was the only institution that the EFTA States formally agreed to transfer sovereignty to. This transfer of sovereignty could be made without amending the constitution, but it required Norway to follow the procedure stipulated in § 115 in the Norwegian Constitution, requiring a 75% affirmative vote in the Norwegian parliament (the Storting).

Abb. 1: ■

Surveillance Authority and a Court of Justice, at 973—1077 and comments to Agreement On a Standing Committee of the EFTA States, at 1079–1101, both in the same.

One of the most important bodies with representatives from both pillars, the Joint Committee consists of representatives from the EU Commission, the EFTA States as well as a representative from the EFTA Surveillance Authority with observer status. This committee is important because it oversees the day-to-day management of the EEA Agreement while also deciding questions of incorporation of EU legal acts into the EEA. Given the requirement of consensus, the influence of the individual EFTA States is relatively strong. Meeting twice a year, the EEA Council consists of members from the Council and the Commission from the EU side and Foreign Ministers of the EFTA States.

The central institutions of the EU are presumably well enough known to warrant omitting extensive presentation, but one institution bears mentioning: the European External Actions Service (EEAS). As the institution tasked with maintaining EU’s foreign relations, the EEAS coordinates and participates in the decisions regarding which EU acts are deemed EEA relevant, and it performs important drafting–technical tasks in this regard.

There are three important bodies on the EFTA side that are worth mentioning in this context. The Standing Committee of the EFTA States consists of the ambassadors from the three EEA states as well as observers from Switzerland and the EFTA Surveillance Authority, and it is where the EFTA States meet and arrive at a common position before they meet in the joint bodies. The policy work is done in the Standing Committee, with subcommittees that are individually responsible for the maintenance and oversight of the separate areas covered by the EEA Agreement as well as the institutional framework. As such, these subcommittees are assigned the task of the technical processing of all EU legislation that is to be incorporated into the EEA Agreement as annexes.\(^{47}\)

By far, the most practically important body in a EEA financial regulatory context—and the one that provided the solution to the supranational dilemma posed by the 2010 Regulations—is the EFTA Surveillance Authority. Based in Brussels with a total staff around 70 people, this institution is tasked with overseeing the EFTA States’ compliance with the EEA Agreement in general. In other words, it is not specifically related to financial supervision and regulation, but it was utilised for this purpose in the establishment of the two-pillar structure financial supervisory structure. As such, it corresponds to the EU ESAs, such as ESMA, EBA and EIOPA. Although not being staffed to perform any material decision-making, regulation or supervision itself, it has the mandate to take individual action if the EFTA States do not comply with the

\(^{47}\) Further description of the subcommittees can be found here: http://www.efta.int/eea/eea-institutions/standing-committee.
EU ESAs opinions and decisions. More specifically, it has the task of facilitating the practical side of those aspects of supranational supervision that the EU regulators deem to be important for the whole Single Market, and which is not left to the discretion of the competent authorities. If the EFTA States do not comply with Surveillance Authority’s decisions, the Authority files a complaint with the EFTA Court. Within the area of competition, it can also issue fines to undertakings in the EFTA States directly.

Additionally, as described below, the EFTA Surveillance Authority also has certain direct responsibilities that follow from individual EU legal acts, such as being the institution that receives applications for registration of credit rating agencies. It is this last function that represents the solution to the constitutional problem, and which represents the novelty for financial regulation as contrasted with the pre-existing arrangement for all EEA Agreement related matters.

Finally, in this context, is the EFTA Court. Structurally, it corresponds to the EU Court of Justice (ECJ) in being the legal apex of its pillar, but its decisions are not binding in the sense that lacks the ability to apply sanctions. The EFTA Court can issue judgements according to Art 34 of the Surveillance and Court Agreement (SCA). These judgments obligate, according to Article 33, the EFTA States to take “necessary measures” to comply with the Court’s judgements. What that means is not exactly clear, however, since the Court lacks what the CJEU does not, namely sanctioning powers. Although these judgements are accorded weight as if the Court had such powers, compliance degree should be better understood in a political and not a legal light.

Although it is influenced by the ECJ to a considerable degree, it is not bound by it. Its only obligation in that respect is to strive for legal homogeneity.

48 The most significant being the Landesbanki case, E-17/11 – Aresbank S.A. v Landsbankinn hf., Fjármálæfirtíð (the Financial Supervisory Authority) and Iceland.
50 According to Art 3 of the SCA, the EFTA Court shall interpret and apply the provisions in conformity with “the relevant rulings of the Court of Justice of the European Communities”, and the Court and the Surveillance Authority shall “pay due account to the principles laid down by the relevant rulings by the Court of Justice”. There is, in other words, an obligation to conform, without that implying an obligation to comply. There is no corresponding duty of conformity on the part of the CJEU. A discussion of the exact nature of the EFTA Court and its relationship with the ECJ on the one hand, and the national courts of the EFTA States on the other, falls outside the scope of this article. For two interesting articles, indicating a recent change of operation and function, see Halvard H. Fredriksen, ‘The EFTA Court 15 Years On’, *International Comparative Law Quarterly* (2010:713-760), and Halvard H. Fredriksen and Christian N.K. Frank-
Moreover, opposed to what, for example, Kern Alexander seems to base his rejection of the Norwegian model upon, the Norwegian courts and authorities are not bound by the CJEU.\footnote{Kern Alexander, ‘The UK’s Third-Country Status Following Brexit: Post-Brexit Models, Third-Country Equivalence and Switzerland’, in Brexit and Financial Services. Law and Policy, Kern Alexander, Catherine Barnard, Eilís Ferran, Andrew Lang & Niamh Moloney (eds.) (Oxford 2018:115-155), see also concluding remarks.}

However, it plays an important role in the national judicial system, although its importance varies according to legal area and type of opinion. As the Norwegian Supreme Court has stated, the fact that the EFTA Court’s advisory decisions are not binding implies that the national courts have a right and a duty to form an independent opinion on decisions from the EFTA Court; importantly, as the Supreme Court has stated, an EFTA Court decision must be accorded considerable weight, and it takes special reasons to deviate from it.\footnote{See, Rt. 2013.258, para 94. This position can, of course, be interpreted either way, depending on whether emphasis is placed on the right and duty to independence or on the narrow exceptions side of the formulation.} On other hand, the fact that the national supreme courts rarely refer questions of law to the EFTA Court\footnote{See Fredriksen & Franklin, 2015:671.} speaks to a tension between the national courts and their sister court, if not an outright resistance to automatically follow the EFTA Court. It can be claimed, however, that it has been considerably more successful in functioning as a facilitator in structuring the relationship with, and furthering the influence of, the ECJ, thereby aiding in strengthening legal homogeneity across the internal market. By adopting a style of reasoning and legal positions that are close the ECJ, it essentially has made the ECJ the apex of the European civil courts. As Fredriksen and Franklin say:

\begin{quote}
[The EFTA Court has constantly let the objective of a homogenous EEA prevail over any temptation it might have otherwise had to exercise its formal independence from the ECJ and to pursue interpretations of the EEA rules at odds with the ECJ’s interpretation of corresponding provisions of EU law. This approach is to be applauded from a functional perspective, but there is no denying that the result is the de facto acknowledgment of the ECJ as the supreme interpreter of the substantive EU/EEA rules of the internal market under both the EU and the EFTA pillars of the EEA.\end{quote}

lin, ‘Of Pragmatism and Principles: The EEA Agreement 20 Years On’, in Common Market Law Review (2015:629-684). The first article credits the court for developing the EEA Agreement and ensuring its dynamic operation through teleological interpretation, going further in this than the ECJ itself, and thereby ensuring the vitality of the EEA Agreement. Interestingly, the second article points to an increased tension between the EFTA Court and the national courts, as well as supranational and ‘agencification’ in the EU, calling for an overhaul of the EEA Agreement as such.\footnote{See Fredriksen & Franklin, 2015:673.}
This ECJ-friendly approach has been accepted by the national authorities, including the courts, which at least partly explains why the EEA Agreement has functioned relatively well for the duration of its existence.\textsuperscript{55} Ironically, this has also contributed to decreasing the necessity of the EFTA Court.\textsuperscript{56}

A more serious problem for the whole set-up, however, is that the EFTA Court lacks power to handle cases involving Joint Committee Decisions,\textsuperscript{57} indicating that the hitherto smooth interplay between the two pillars is a matter of political expediency more than legal necessity. This indicates that the system in its present form is not constructed for handling deep legal conflicts about the nature and function of EU legal acts and decisions that are to be implemented in the EFTA pillar.

One other institution should be noted, if only for its absence. The Board of Appeals handles complaints from affected parties by the ESAs, and is set up in Article 60 of the 2010 Regulations. Article 60 grants a right of appeal against decisions by the ESAs that relate to Articles 17–19 and other decisions, in accordance with the directives and regulations referred to in Article 1.2. The EFTA States could have set up an institutional counterpart on their pillar, but they chose not to, for reasons of expediency and resource use, as they felt that the instances when such appeals would arise would be too infrequent to warrant institutional innovation.\textsuperscript{58} Worries about the risk of divergence due to an \textit{ad hoc} body that could take on independent views were also raised. These two arguments conflict, as the chance of divergence or lack of homogeneity is unlikely if the first argument about the lack of relevant cases is true. As a mitigating effect on the lack of a comparable appeal system, the Norwegian authorities refer to the possibility of appeal against EFTA Surveillance Authority decisions to the EFTA Court. This seems like a reasonable alternative. According to the Norwegian Government, the EFTA Court will only consider the validity of the decisions and not the more financial–technical aspects, similar to the CJEU. However, in contrast to the CJEU and the EFTA Court,

\textsuperscript{55} The majority of the Norwegian population (approx. 65–70\%) is currently against the idea of joining the European Union. Only approximately 25\% say they would have voted against the EEA if a referendum were held tomorrow, indicating the degree of satisfaction with the arrangement. However, a large percentage (20–25\%) has no opinion on the EEA, implying that many have no idea of what it means. See, http://www.klassekampen.no/article/20171128/ARTICLE/171129962.
\textsuperscript{56} See Fredriksen & Franklin, 2015:673.
\textsuperscript{57} It only has competence in direct actions to review the legal conformity of EFTA Surveillance Authority decisions, in addition, of course, to interpreting the EEA Agreement when asked to do so by the national courts as a matter of preliminary reference. See SCA, Art. 36 and 34.
\textsuperscript{58} Prop 100 s (2015–2016), at 14–15.
the Board of Appeals is set up to be staffed with experts, who can ensure that any subsequent legal handling of the appeals will be sufficiently quality controlled.\textsuperscript{59}

3.3.2. How EU financial regulation is transformed into binding EEA law

Generally, when the EU adopts legal acts that are deemed EEA-relevant by the Joint Committee in the EFTA structure, the EFTA Secretariat drafts a Joint Committee Decision (JCD), which is sent to the EEAS and subsequently to the Commission on the EU side after having been cleared by the experts and subcommittees. This reflects what is commonly called that ‘mirror legislation’, stemming from Article 7 of the EEA Agreement, which states, ‘an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties’.\textsuperscript{60} After the Commission, it is considered by the EU Council in the event of significant adaptations. When final clearing is obtained, either by the Council or by the Commission, the Joint Committee decides whether to incorporate the act into the EEA Agreement, all according to a Council Regulation concerning the implementation of the EEA Agreement.\textsuperscript{61} This procedure is followed regardless of the specific area covered by the EEA Agreement. In this context, it is important to note that the 2010 Regulation does not affect this procedure of incorporation.

For financial regulation, however, the process is a little more elaborate and technical, following the Lamfalussy procedure, according to which the supervisory authorities have been delegated significant competence to make binding decisions, as described above. A key challenge for the existing two-pillar structure within the area of financial regulation is that the supervisory authorities are not only granted power to propose and make new law, often in the form of directly binding regulations, but also, as mentioned, to directly intervene in the national markets. Although the EU Commission has the competence to directly fine individual undertakings in the EFTA States for breaches of EU competition law, the centrality of supranationality for the EU ESAs

\textsuperscript{59} As Article 58.2 of the 2010 Regulations states, the six members of the Board ‘shall be individuals of a high repute with a proven record of relevant knowledge and professional experience, including supervisory, experience to a sufficiently high level in the fields of banking, insurance, occupational pensions, securities markets or other financial services’, in addition to having ‘sufficient legal expertise to provide expert legal advice on the legality of the Authority’s exercise of its powers’.

\textsuperscript{60} For a discussion of Article 7, see the comments to the article in Finn Arnesen et. al. 2018.

\textsuperscript{61} Council Regulation (EC) No 894/94 concerning arrangements for implementing the Agreement on the European Economic Area.
presents a novel challenge to the two-pillar structure. Put differently, the ESA agencies had been given powers that not even the EFTA Court enjoyed.

The system is intended to work for financial regulation in the following way: Since the EFTA States are not members of the EU, it is the EFTA Surveillance Authority that formally makes decisions concerning the obligations arising from the EEA Agreement. However, within financial market regulation and supervision there is an extra consideration, in that the decisions of the EFTA Surveillance Authority will be adopted on the basis of drafts prepared by the EU ESAs that involve exactly the supranational elements that posed such problems. So, for instance, when ESMA makes a binding decision that involves invoking Article 17 or, more practically relevant, MiFIR Article 40, ESMA will send a draft of the decision to the EFTA Surveillance Authority, which will then translate that decision into binding EFTA States decisions. This is no small task. All legal acts taken by the EU, as well as all rule and decision making by the EU ESAs, must follow this procedure, in the specific sense that drafts must be circulated that make the EU decisions EEA compliant. This means, for example, that all references to EU bodies, including provisions of institutional authority and appeal mechanisms, must be translated to fit the institutions of the EFTA pillar, for example, with the EFTA Surveillance Authority assuming the legal function of the EU ESAs. This EEA translation can pose considerable legal-technical challenges, as much EU regulation is tailored to fit the EU’s structure and institutions.

Technically, this structure was legally implemented in a series of decisions in the EEA Joint Committee, by way of amending the 2010 Regulations, (the 2016 Decisions) to extend the authority of the EU ESAs to the EFTA pillar, aiming to ensure integrity. The main function of these 2016 Decisions is to include the financial supervisors of the EEA EFTA States in the 2010 Regulations. As Article 1(b) states, ‘the terms “Member State(s)” and “competent authority” shall be understood to include, in addition to their meaning in the Regulation, the EFTA States and their competent authorities, respectively’, thereby subjecting the supervisors of the EFTA States to the same regulatory structure as that of the EU States. In doing this, the EFTA States are accorded participatory rights as well as being subjected to the ESAs’ rules and decisions on par with the EU Member States. Concerning the first, Article 1(a) grants the EFTA States the right to participate, not only in the Board of Supervisors in the ESAs but also, and importantly, ‘in the preparatory bodies of the [ESAs], including internal committees and panels’. In other words, the supervisors of the EFTA States are given the same rights as their fellow EU States supervisors,

62 Decision of the EEA Joint Committee No 98/2016 (ESRB), No 99/2016 (EBA), No 00/2016 (EIOPA) and No. 201/2016 (ESMA).
‘but for the right to vote’, indicating that ‘rule-taker, not rule-maker-talk’ is an expression that does not capture the relationship between the ESAs, the supervisors of the Members States, and the EFTA States.  

However, the competence of the EFTA Surveillance Authority is also subjected to relatively tight control. In section 2.1, we saw the logic of Article 17 and how it functions vis-à-vis the EU Member States. Since it implies a two-step process, where the first, non-binding, recommendation step does not involve supranational issues whereas the second does, it mandates amending the 2010 Regulations over and above simply adding the EFTA pillar to the structure. For example, Article 1(i)(vi) states that Article 17.4 shall be read as follows:

Where the competent authority has not complied with the EEA Agreement within 1 month from receipt of the Authority’s recommendation, the EFTA Surveillance Authority may issue a formal opinion requiring the competent authority to take the action necessary to comply with the EEA Agreement. The EFTA Surveillance Authority’s formal opinion shall take into account the Authority’s recommendation. The EFTA Surveillance Authority shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The EFTA Surveillance Authority may extend this period by 1 month. Formal opinions by the EFTA Surveillance Authority shall, without undue delay, be adopted on the basis of drafts prepared by the Authority at its own initiative or at the request of the EFTA Surveillance Authority. The competent authorities shall provide Authority and the EFTA Surveillance Authority with all necessary information (emp. author).

This provision performs two important functions. First, it states explicitly that the EFTA Surveillance Authority cannot issue independent decisions, as these must be based on drafts by the EU ESAs, even if the initiative comes from the EFTA side. Second, it also obligates the national supervisors to provide information to both pillars, although it is relatively obvious that the EFTA Surveillance Authority is simply ‘cc’ed’ in on the direct dialogue between the national supervisor and the relevant European ESA. As is clear from Article 1 (a), any work that the EFTA Surveillance Authority performs is described as ‘carrying out’ the functions of the EU ESAs, and the ESAs participation in the committees of the EFTA pillar is to ensure that the EFTA Surveillance Authority performs its function according to the dictates of the central European supervisors. This is submission, although it is no more severe than what is expected from the other national supervisors in Europe.

An important feature of these 2016 Decisions is that they establish the principle of mutual participation. The EFTA States (and the EFTA Surveillance Authority) obtain access to the important rule-developing forums and various committees. In exchange, the EU ensures, short of direct one-pillar control, regulatory and supervisory harmony. ESA decisions find their way into the EEA through corresponding decisions in the European Surveillance Authority. Legislative decisions, on the other hand, are transformed into EEA law by way of decisions in the EEA Joint Committee.

Given that the drafts of the EU legislative decisions are to be circulated within the bodies of both pillars, possibly all the way up to the EU Council on the EU side, before it ends up in the Joint Committee, it is no small wonder that the backlog of (important) legal acts and decisions to be incorporated into the EEA Agreement is growing consistently and alarmingly. There are ways to counter this growth in backlog acts, for example, by drafting identical national legislation once the EU directives are published, as Norway did in the case of the Alternative Investment Fund Manager Directive. This is, however, a cumbersome and time-consuming task, and thus it cannot be expected to be a modus operandi for implementing EU legal acts and decisions in the EFTA States. The importance of this problem must not be underestimated. Since neither EU legal acts nor EFTA Court decisions have direct effect, an increasing backlog promises only disintegration, not integration. In the words of the EFTA Court, an integrated Single Market depends on EFTA and EU citizens and operators having the same rights, that is, ‘relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA’.

This is not achievable if there is a substantial backlog of important directives and regulations within the area of financial market regulation. The implementation process should, therefore, be the subject of an overhaul, as it is ill enough equipped in its present state and woefully inadequate if the UK should join the EEA.

Crucially in this regard, the EFTA Surveillance Authority is not legally or formally obligated to follow the draft decisions of the ESAs. If they were, the arrangement would not solve the constitutional problems that motivated the structure. The issue of non-compliance by the EFTA Surveillance Authority with the EU ESAs was not considered in the agreement between the EU and EFTA States. That the EFTA States would refuse to comply with binding decisions by ESMA, for example, was such a politically problematic issue that

64 At the time of writing (22 March 2018), the backlog is approx. 350 acts, according to information obtained from the Ministry of Finance. The sorry state of affairs is that this backlog is also growing, even at a time when the regulatory grand project after the financial crisis has subsided.

65 Case E-18/11, Irish Bank, para. 122.
it was avoided altogether. The main concern on the EU side was that there is harmony and unity in the application of the supranational powers with which the ESAs have been invested, and correspondingly, for the EFTA States, that they are granted access to the regulatory process as well as guaranteed their passporting rights. In the event that the EFTA States do not comply with the vastly more expansive and sophisticated expertise on the EU ESA side, the whole EEA Agreement will likely be in jeopardy. Clearly, this is a rather shaky foundation for such an important structure of international law.

One thing is what we for the sake of brevity can call Article 17–19 cases, that is, circumstances that involve financial meltdown or crisis. Another, and far more practically relevant set of provisions are the rules enabling the ESAs to directly regulate and govern the national markets, for example, in the governing of credit rating agencies and transaction registers. Within these areas, including the important domain of MiFIR, the national authorities are completely bypassed. The practical consequence of this is that when, for example, a company in Norway wants to apply for a license to operate as a credit rating agency, it does not apply to the Norwegian financial authorities. Given the two-pillar structure, the procedure is now rather complex. Formally, the application is sent to, and eventually approved by, the EFTA Surveillance Authority. The application approval is then based on a draft from ESMA, which has no authority to grant such applications within the EFTA States, but which nevertheless is the institution that determines which agencies’ ratings can be used in the internal market. Adding to this is the fact that the EFTA Surveillance Authority is a far cry from being professionally staffed to handle the technical supervisory work related to applications from financial institutions, or to effectively take on any of the supervisory tasks that are ascribed to the ESAs under the 2010 Regulations and other legal acts, where the EU ESAs have some degree of supranational powers. Whereas there are hundreds of people employed in the EU ESAs (although many of those are not involved in work related to supranational powers and supervision), there are two case-handlers in the EFTA Surveillance Authority handling the area of financial services in all three EEA EFTA States, supported by a relatively small legal department.

This strongly indicates that the EFTA Surveillance Authority is not set up to have any independent function besides facilitating the contact between the

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66 As Fredriksen and Franklin (2015:679fn) state, ‘[B]oth the relevant financial authorities of the EFTA States and affected private parties would be better served by the possibility of opposing unwelcome decisions of the EU agencies before the EU courts under Article 263 TFEU. Paradoxically, constitutional concerns appear once again to have limited access to effective judicial protection’.
institution that is applying for status as a credit rating agency and ESMA, which is not formally, but in reality, handling the application (nor any other decisions under the Regulations, for that matter). Likewise, if ESMA sees the need to invoke its powers of direct inspection according to CRA II, Article 23 (d), it must liaise with the EFTA Surveillance Authority, which will formally act as inspector since no foreign authority can be granted access to physical premises in Norway, without the assistance of national authorities. Although the national financial authorities will be kept informed, they have no formal role to play in either the application process or the on-site inspection, and they are formally oriented ex post only through the information they receive in their capacity as non-voting members of ESMA’s Board of Supervisors. However, were it to come to an inspection, the national supervisors would likely be involved in an informal dialogue, both with the operative forces in ESMA and certainly with the EFTA Surveillance Authority. As things stand, however, the national supervisor is relegated to being an after-the-fact receiver of information with regard to content and the results of the application for licensing to operate as a credit rating agency. It takes little imagination to envision several other, practically relevant issues, where the national supervisor would likely find itself in such a sidelined position.

In case of disagreements between the EU ESAs and EFTA Surveillance Authority, the disagreement can be brought before the EEA Joint committee at the request of one of the parties, as provided for in the EEA Agreement. However, this will not take the form of formal arbitration or court-like proceedings but will be organised on an ad hoc basis, with the intention to find amicable solutions in the individual case.

In addition to granting the EEA States passporting status into the financial markets, the agreement on the supervisory structure secured a vital concern for the EEA States, namely, non-voting participation on the boards of the ESAs as well as in the preparatory bodies. This function must not be underestimated, for reasons stated above. As one Norwegian official representative observed, ‘We feel that the discussions take place on merit. The other members are for example interested in our experience with commodity derivatives, where we have some expertise due to our position in natural resources’.67 This position is corroborated by the recent statements by the Director of the Agency for the Cooperation of the Energy Regulators (ACER), who says concerning Norway’s influence in ACER – a comparable structure to the ESAs within the energy sector – “by participating in the working groups and in the Board of Regulators, [the Norwegian Energy Regulator] can contribute to designing the

67 Interview with Erling Rikheim, Friday 16 February 2018.
regulations. And from our point of view there is much experience and expertise to be collected from Norway.” 68

It seems likely that the UK could gain vast influence in these bodies in the EU ESAs if it were to achieve the same formal status as Norway has today. However, it is only through the two-pillar arrangement, utilising the existing structure and tailoring it to fit the special needs of financial market supervision, that such participation and information is secured.

4. Concluding remarks

Thus far, pragmatism and submission from the EFTA States based on political expediency has kept the EEA system working, although it is under an increasingly heavy burden as the Commissions accelerates its transfer of competences to the ESAs. Due to its dependency on an informal cooperative spirit—and too much to lose by one side—the structure has proved relatively robust, if absence of conflict and economic performance is the measure. However, the system has, as argued above, little to offer if any of the states on the EFTA side of the divide challenge the system. Crucially, there are no satisfactory dispute resolution mechanisms in place, indicating that the system needs refurbishment and maintenance. With Brexit in full swing, the prospects of such a makeover are dim on a stand-alone basis. Presently, there is simply too much going on. In the event the UK remains in the EEA, however, things look differently, and this might provide a much-needed opportunity to overhaul central parts of the system while maintaining its advantages. Ironically, therefore, the shortcomings of the system might be the very leverage that the UK can capitalise on if it wishes to negotiate itself into the EEA EFTA system. Such an overhaul should include the establishment of a corresponding Board of Appeals on the EFTA side as well as satisfactory dispute settlement mechanisms.

It remains to be seen whether the UK will be able to strike a bespoke deal that cuts the Gordian knot in securing passporting rights as well as retaining independence from the ESAs. This article has tried to explain why that knot

68 Unofficial translation of interview in Europower 13 March, 2018, available here (in Norwegian): http://www.europower.com/no/article286613.ece. Granted, such statements must be read in context, which was the pending Norwegian vote to join EU’s third energy package, and a structure largely modelled directly on the passporting solution for financial markets. Notwithstanding that, there is some credibility to the claim, since the Norwegian energy markets are at the forefront in the world, as regards relative size, technological sophistication and long-standing experience with regulation of waterfalls, gas and oil.
will be hard to cut as well as outlining the benefits of joining the EEA, recognising the vast differences in bargaining power between the UK and the EFTA States when it comes to market power and expertise.

The problem with the equivalence regime is not only that it is a shaky privilege that can be withdrawn. Even through the UK may have a completely identical regulatory system in place by the time Brexit becomes a reality due to the Great Repeal Bill, it does not take more than a short period of market disruption before any existing regulatory convergence is in serious trouble. In other words, the very independence the UK would gain is premised on its non-use. The moment that the UK, as is true of any EFTA-member, starts to utilise its newfound independence, it risks going from being independent to being alone, particularly given how important homogeneity is to the EU.

The EU regulatory system embarked on what resembles a federalist project within the area of financial regulation when it ascribed its ESAs such broad powers. And this tendency seems only to be increasing, as the Commission has signalled that one of its top priorities is to further strengthen the ESAs powers when it recently accelerated its Capital Markets Union project. The EU must, in other words, undertake a full, public U-turn if it wants to grant the UK a special deal.

Moreover, as I have argued in this article, the increasing tendency indicates that it becomes harder by the day to achieve what Norway failed to achieve four years ago. Nowhere is this more evident than in the Commission’s plans to move towards establishing the ESAs as the dominant supervisors for all financial markets in Europe in connection with the introduction of the Capital Markets Union. The clear message is that the ESAs will act as independent supervisors, over and beyond the decisions and influences of the national financial authorities. And what is the EU going to tell the German Bafin or the French AMF if it gives the non-member FCA a free pass, all the while with the UK getting substantially the same benefits?

In a recent book on Brexit and financial services, Kern Alexander argues that there are three reasons that the EEA model cannot be UK’s model post Brexit, one of them being the free movement of persons. The other two, however, are supposedly that the UK would be bound by rules ‘it could no longer participate in making, and it would also be bound by decisions of the CJEU’. The first of these must be qualified considerably, as the UK would, were it join this model, participate in the making of the rules. It would simply not get to vote

70 Alexander, 2018:151.
on them. The second reason is simply mistaken. Norway is not, and cannot be, bound by the CJEU. Crudely put, the whole purpose of the arrangement is precisely to get around being bound. And by getting around being bound, Norway has at least provided an example for how it is possible to have the cake and eat it, too, although the cake might not be home-made.

However, even if decisions from the CJEU do not have any direct effect, a true disadvantage of this solution is that it amounts to a constitutional version of a Potemkin village, a construction designed solely to replicate hyper-formal sovereignty while glossing over the fact that this is essentially a political peace-agreement. But if hyper-formality can settle a political problem, why not?

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