

# EFTA's model of compliance would struggle to accommodate the UK



*Would the Norway model mean the UK was subject to the rulings of a foreign court? **Morten Kinander (Norwegian Business School)** responds to Øyvind Bø's recent post for LSE Brexit. Yes, EFTA states are subject to the decisions of their Surveillance Authorities, but they are not formally bound by them in the sense that the state is subject to sanctions. This is an important distinction because it shows why the EFTA system is able to accommodate the sovereignty of its members. Yet EFTA was not designed for an ever more powerful supervisory structure, and it would struggle to incorporate the UK. This presents a welcome opportunity to refurbish the whole*

*EFTA-pillar.*

Judge Øyvind Bø's [competent response](#) to [my piece](#) about Brexit, financial markets, and the Norwegian model seems to express relative agreement with my main point: that the UK has little hope of bargaining its way into passporting rights and special deals. Gaining access to the EU financial markets is a question of fitting into a supervisory system that has evolved into a semi-constitutional structure, with necessary supranational elements. In such a system, special exceptions make little sense.

He has, however, two issues with my article, one concerning the EFTA Court and the other concerning the EFTA Surveillance Authority.



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Concerning the EFTA Court's and the binding effect on Norwegian law, Bø is right to point out that I may have underplayed the function of the EFTA Court's decisions in Norwegian law. Decisions that are not merely advisory according to the Article 34 of the Surveillance and Court Agreement (SCA) (which make up the majority of the decisions), are binding in the sense that the EFTA States are required to take all "necessary measures" in complying with the judgments of the Court, cf SCA Art 33. However, the Court itself lacks sanctioning capacity, and compliance is more a question of political choice than a legal obligation. Yes, the EFTA Court has in one sense binding effect in Norway, but surely, from a sovereignty perspective, being subject to the EFTA Court is a far cry from being subjected to the CJEU, even though the EFTA Court is set up to imitate the CJEU.

Concerning the EFTA Surveillance Authority, Bø claims that the EU ESAs' opinions are essentially binding. As he says:

“Annex IX to the EEA Agreement states that whenever the ESAs issue draft decisions to the EFTA Surveillance Authority, the latter ‘shall, without undue delay’ adopt the relevant decision. The wording clearly suggests that the EFTA Surveillance Authority is under a legal duty to adopt a decision whenever the ESAs issue a draft. Arguably, the role of the EFTA Surveillance Authority is to adapt the draft, which has been drafted within the framework of the EU, to the framework of the EEA Agreement, and not to reconsider the underlying substance of the decision.”

The crucial point here is the phrase “under a legal duty”, which reveals a disagreement between Bø and myself: The claim that the EFTA Surveillance Authority is legally obligated to make certain decisions overlooks the centrality of the formal aspect in making the whole structure work from a sovereignty perspective. As the Norwegian Ministry of Finance said when presenting the arrangement: “EFTA’s Surveillance Authority will, however, have *no legal or in any way formal duty* to make a decision with a certain specific content when a draft has been received” (Prop 100 S (2015-2016), p. 14, emphasis mine). Obviously, if the EFTA Surveillance Authority or any of the EFTA States do not make a corresponding decision, the whole structure will likely fall apart, and with it potentially the EEA Agreement. So yes, in a sense the EEA EFTA States are bound by decisions of the ESAs, but this binding is a political and not a legal one, although the distinction is formal to the point of absurdity.

My main point, however, is that this hyper-formality performs a central task: The EEA EFTA States are not formally bound by the EU ESAs (and at least not by the CJEU) and as they get to influence the rules to a far greater extent than is the case for non-EEA EFTA States. That formality achieves, in other words, the crucial “selling case” of the structure, and provides a model of less subjection, although not as little when viewed from a purely formal perspective.

In a broader sense this precarious structure simultaneously presents an opportunity to rebuild the system, since it is far from ready to include an independent-minded and sophisticated player such as the UK. For example, as was (part of) my point; non-compliance does not carry a legal stick, as compliance turns on political risk of disagreement in the Joint EEA Committee, where the EU has the heaviest hand. In other words, the decisions of the EFTA Court have such a high degree of compliance in the EEA EFTA States due to the politically asymmetric status of the current EEA EFTA States.

Underlying this is the fact that the whole system was not designed for its current *modus operandi* with a supranational and ever more powerful supervisory structure, making decisions directly applicable in the Member States. The EU pillar seems to manage this, as the much-needed powers and regulations drafted by the EU ESAs are formally enacted by the Commission – thus complying with the conditions of delegation according to the *Meroni*-doctrine, with the CJEU being a true court of justice at the apex. The EFTA pillar, on the other hand, and along with it, the EFTA Court, is not designed to carry this weight, especially with an ever more powerful supervisory system that depends upon direct effect in the national markets.

The fact that the system is unfit for the direct and unchanged inclusion of a player like the UK gives Britain an opportunity to focus on remodelling the two-pillar structure according to its own preferences.

*This post represents the views of the author and not those of the Brexit blog, nor the LSE.*

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