CAN THE EU MAKE ICELAND COMPLY?

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[Please note that this is a work in progress]

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1 Introduction

It is generally agreed that the European Union (EU) is unique among international organisations in the extent to which it is able to elicit compliance with its rules, not only in its member states but also in a range of non-member states within its sphere of influence. Recent studies have, for example, called attention to the EU’s domestic impact on the candidate countries which are subject to accession conditionality and countries included in the European Neighbourhood Policy (ENP). However, it is often forgotten that the EU’s influence is also deeply felt in the few remaining non-member states in Western Europe, such as Iceland. Although these countries have chosen to remain outside of the EU, they are far from being immune to the EU’s influence. In fact, out of all countries associated with the EU, they are in many ways the most closely linked to the Union.

Iceland’s relations with the EU are based primarily on the European Economic Area (EEA) Agreement, which demands high level integration of the EU acquis into its national legal system. The EEA permits Iceland, along with Norway and Liechtenstein, to participate in the EU’s internal market on the condition that it adopts all provisions relevant to the four freedoms, including such diverse policy areas as competition and state aid rules, social policy, consumer protection, environmental policy, and company law. As the internal market is in a state of continuous development, this includes not only legislation that was in place at the time the EEA Agreement came into effect in 1994 but also all new legal acts that are passed in the relevant areas, which has constituted the bulk of EU legislation. This Agreement has enabled Iceland to participate in fields of cooperation which it sees as advantageous while remaining outside of less attractive areas, chiefly the Common Fisheries Policy. There is, however, a price to pay for “à la carte” relations with the EU, as the Agreement grants only very limited access to EU decision-making. Therefore, much like in other non-member states, compliance with EU policy usually entails unilateral domestic adjustment.

Even though Iceland has little access to the EU’s decision-making institutions, it willingly complies with the majority of the EU legislation which it is required to adopt through the EEA Agreement. There are various possible explanations for this.

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2 The EEA Agreement was signed in Oporto, Portugal on 2 May 1992 by the then seven EFTA states and the then 12 EU states and came into effect 1 January 1994.

3 In line with widespread convention in the compliance literature, I most often refer to “EU” or “European” legislation or policy in this paper although “EC” would be more accurate as the EEA Agreement only entails adoption of pillar I legislation.

4 Based on interviews with high ranking officials at the Icelandic Mission to the EU and the Ministry of Foreign Affairs.
For example, EU legislation might in many cases correspond well with pre-existing domestic arrangements and thus does not require much change to the national legal framework. Alternatively, state actors might often feel that EU policy poses an effective solution to domestic needs and policy challenges. EU demands for rule adoption might also generally be regarded as appropriate in light of the obligations Iceland has voluntarily undertaken under the EEA Agreement. Finally, there could be a particularly strong “culture of compliance” in Iceland similar to that found in the other Nordic countries. Yet, as in all states adopting EU rules, situations do come up where compliance is delayed or obstructed, perhaps because EU policy strays too far from the domestic status quo. In these cases voluntary mechanisms do not suffice to bring about change and ensuring compliance necessitates a certain amount of coercion on behalf of the EU.

Thus the key question posed in this paper is what coercive mechanisms does the EU have to enforce its policy in Iceland and how effective are they in the face of domestic opposition or incapacity? Are these mechanisms strong enough to ensure complete and full compliance under any circumstances? Iceland is in a relatively unusual position among non-member states adopting EU legislation, as it does not aspire to EU membership. Therefore, the EU cannot use the carrot of membership to induce compliance in Iceland, which has proved so effective in the candidate countries. Nevertheless, the EEA Agreement grants access to the internal market on which Iceland is highly dependent. Membership of the EEA is considered to have far reaching economic benefits and the threat of exclusion from the internal market through the discontinuation of the EEA Agreement therefore potentially gives the EU considerable coercive leverage over Iceland. This leverage, however, has its limitations as the threat of exclusion only applies to the early incorporation of EU legislation into the EEA Agreement. Thus, it is hypothesised that the EU’s coercive mechanisms may not always be strong enough to ensure accurate transposition or full implementation of European legislation at the national level.

In an attempt to shed light on the research question, I begin by defining what is meant by compliance, distinguishing particularly between transposition as opposed to implementation of legislation. I then attempt to evaluate the likelihood of coercion being necessary to elicit compliance in Iceland and give examples of how the EU’s coercive mechanisms work in member states as opposed to non-member states such as the candidate countries. Finally, I look in detail at the process of adoption of EU legislation in Iceland focusing on the institutional framework of the EEA Agreement and the consequences of non-compliance at each stage of the process.

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5 Schimmelfennig and Sedelmier (2005a: 20-22) refer to this type of rule transfer as “lesson-drawing”. In these instances, adoption of EU rules is domestically driven and the activities of the EU, i.e. the rewards that it attaches to the adoption of particular rules or its persuasion abilities, are not the decisive factor in the decision of states to adopt EU rules. Rather, states take the initiative to import EU rules voluntarily as the result of perceived domestic utility.

6 Falkner et al. (2005) observed that transposition of EU directives was generally both timely and correct in the Nordic EU members which they traced to a strong culture for law observance.
2 What is (non)-compliance?

Both the transposition and the implementation of EU measures at the national level should correspond with the objectives defined by the EU (Knill 2001: 17) in order for a policy to be complied with. It is important to distinguish between the two because the EU has different mechanisms at its disposal for monitoring and ensuring transposition as opposed to implementation and studies have shown that legislation which is coercively imposed on states rather than voluntarily adopted is more likely to be superficially transposed than fully implemented (Schimmelfennig and Sedelmeier 2005b). The former involves the accurate incorporation of European legislation into national legislation which may often include repealing or amending domestic laws that conflict with the new EU legislation (Börzel 2000: 149; Cini 2003: 352-3). Policy implementation on the other hand is more comprehensive and refers to the “putting into effect” of European law and policies at the ground level (Cini 2003: 349-53). This requires that the necessary administrative infrastructure and resources have been provided to put the objective of the policy into practice and the competent authorities encouraged to comply with the legislation by monitoring, positive or negative sanctions and compulsory corrective measures (Börzel 2000: 149). If a policy is only transposed but not implemented, its effectiveness is severely curtailed.

The EU has different methods of legislating to develop its policy, which give states varying degrees of flexibility with respect to their transposition and implementation (Craig and De Burca 2003: 112-16; Steiner et al. 2006: 56-57). The two principle types of legislation are regulations and directives. Regulations are obligatory in all of their elements. In the member states, regulations are “directly applicable” meaning that they do not need to be incorporated into national law through national legal instruments but automatically become part of national law. It is then the responsibility of the national administrative authorities to make sure they are applied correctly (Cini 2003: 352-3). Non-compliance with regulations therefore generally refers to their implementation and takes the form of not or incorrectly applying and enforcing European obligations as well as of not repealing conflicting national measures (Börzel 2001: 805-6).

Directives give states more flexibility. They are binding as to the goals to be achieved but leave states considerable choice as to how they are implemented. Nevertheless, the ends which states have to meet are set out in considerable detail and so directives can also have substantial impact. Unlike regulations, directives are not directly applicable but have to be incorporated into national law. Thus non-compliance with directives can refer to non-transposition, i.e. the total failure to issue the required national legislation or the incomplete or incorrect incorporation of directives into national law in the sense that parts of the obligations of the directive have not been met or national regulations that deviate from European obligations have not been amended or repealed. Even if directives have been properly transposed, they still may not be practically implemented. Non-compliance in this sense can involve taking

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7 EU regulations are not directly applicable in the EFTA parties to the EEA Agreement and thus need to be transposed to be complied with. This will be discussed further in section 5.
8 Direct applicability can serve to limit the utility of regulations as it is difficult to devise legislation which is suited in its entirety to each of the member states’ differing legal systems and varying political, administrative and social arrangements (Craig and de Burca 2003: 115).
conflicting national measures or failing to invoke the obligations of the directive by not enforcing Community law effectively or taking positive action against violators, both national administration and judicial organs, as well as making adequate remedies available to the individual against infringements (Börzel 2001: 805-6). Iceland’s compliance with EU legislation will be evaluated against these definitions, but first I attempt to determine the likelihood of the EU having to resort to coercive methods to induce compliance in Iceland.

3 To what extent does the EU need to exercise coercion over Iceland?

Previous studies have posited different theories as to the conditions under which states are likely to comply or not comply with EU policy requirements. One of the most prominent of these is based on the assumption that states are likely to comply if the domestic costs of adopting EU policy are low. Another notes that states are more inclined to comply with EU demands if they have undergone a process of international socialisation into EU norms. Thirdly, it has been found that a certain level of organisational and administrative capacity within states facilitates compliance. Finally, it has been observed that a certain “culture of compliance” is present to a larger extent in some states than in others. Based on the assumption that the logics of consequentialism and appropriateness can often work simultaneously to induce action, this section looks at the different hypotheses regarding the willingness of states to comply and evaluates them against the Icelandic context in an attempt to assess the likelihood of the EU having to rely on coercive mechanisms to ensure compliance with its policy in Iceland.

3.1 Goodness of fit and adaptation costs

The first compliance model is derived from the rationalist assumption that compliance with EU policy is likely to be based largely on cost/benefit calculations of the positive and negative consequences it entails, where material interests, power and welfare figure prominently. States will in this way adopt EU rules if the benefits of complying exceed the domestic adaptation costs (Schimmelfennig and Sedelmeier 2005b: 12). It generally begins by looking at the “goodness of fit” between EU and national policy noting that if an EU policy challenges a states’ existing policy goals, regulatory standards, or underlying problem solving approach, some degree of adaptation to domestic legal and administrative institutions will be required in order to implement the policy at the national level (Börzel 2000; Börzel and Risse 2003: 61-62; Wessels et al. 2003: 14). The more an EU policy contradicts the corresponding national policy, the greater the material and political costs involved in adapting legal and administrative structures in the implementation process (Börzel 2000: 148). This is usually referred to as “adaptation costs”. When EU policy is incompatible with existing domestic arrangements and imposes significant adaptation costs, national governments implementing EU policy are under pressure from existing national actors and institutions to retain the domestic status quo in order to avoid the costs that changes to institutional structures would entail (Radaelli 2003: 40-41). Thus, according to this thesis, implementation problems are apt to occur if adaptation costs are high (Bache and Jordan 2006: 18; Knill 2001; Schimmelfennig and Sedelmeier 2004: 672).
Incongruence\(^9\) between the EU and national spheres occurs because the EU policy process takes place on different levels of governance where policy is defined at the EU level but implemented at the national level (Radaelli 2003: 40-41; Wessels et al. 2003: 3). States endeavour to make their policy preferences heard during the policy formulation process at the EU level. Powerful, typically large, member states are the most likely to succeed in uploading their policy preferences because they carry the most weight in the key legislative bodies of the EU. Nevertheless, it is doubtful that the same group of states will always be successful in promoting their preferences. The states that are not able to upload their policy choices are likely to be faced with a considerable degree of incongruence (Börzel and Risse 2003: 62). So, although national institutions are involved in preparing and making EU legislation, the implementation of EU policy at the national level can impose considerable challenges (Wessels et al. 2003: 5).

A small non-member state, such as Iceland, is at a considerable disadvantage when it comes to promoting its preferences at the EU level, as compared to the larger member states, because it has only limited resources at its disposal and does not have direct access to the EU’s decision-making institutions. This makes it more difficult for it to upload its policy choices which in turn might mean that it will frequently be faced with considerable policy incongruence along with the significant adaptation costs of having to implement inconvenient policy. Furthermore, before Iceland joined the EEA, Icelandic policy in a number of areas had not followed the same trajectory as the EU countries. High levels of policy incongruence were, for example, noticeable in areas such as competition, finance, telecommunication and consumer affairs (Thorhallsson 2002). This lack of tradition for EU style policy along with Iceland’s relative inability to make its voice heard at the EU level has probably implied significant adaptation costs for Iceland upon joining the EEA. So based on this argument, compliance problems are fairly likely in Iceland at least compared to the larger and more established member states.

3.2 International socialisation

It has been noted that a willingness to adopt EU policy can be promoted through high levels of social interaction at the EU level based on the social constructivist logic of appropriateness. In other words, states involved in the EU policy process undergo a process of international socialisation in which their preferences change as a result of persuasion (Checkel 2001: 561-2; Schimmelfennig and Sedelmeier 2005: 6 and 9). Similarly Börzel and Risse (2003) note that actors can learn to internalise new norms and rules in order to become good members of society and that EU institutions can thus shape the behaviour and preferences of domestic actors (Börzel and Risse 2003: 67-68).

These types of incentives for compliance may, however, be stronger in the member states than non-member states. This is because the member states are full participants in the EU’s decision-making process which serves to legitimise the EU’s policy output. They also have a high degree of contact with their fellow member states and with whom they work closely within the EU institutional framework where they

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\(^9\) Many scholars refer to incompatibility between EU policy and domestic arrangements as “misfit”. In this study, the terms “mismatch” or “incongruence” are preferred.
mutually observe each other and constantly remind each other of their duties and obligations. There is, therefore, pressure for mutual information and empathy in the EU system of governance (Jachtenfuchs and Kohler-Koch 2004: 100).

Socialisation does not, however, mean that member states always observe their obligations. In fact, despite taking part full part in EU level cooperation, non-compliance is fairly common among the EU’s members. Socialisation is likely to have even less of an impact on non-member states because of their lack of access to EU decision-making processes. The fact that the candidate countries were not treated as equal partners and had no say in the EU decision-making was, for example, found to undermine the effectiveness of social learning and any EU rule was likely to pose legitimacy problems and have the stigma of foreign imposition (Schimmelfennig and Sedelmeier 2005a: 18-19).

Through the EEA Agreement, Iceland is allowed to participate in the preparatory work of the Commission when new legislation is being drawn up and has access to Commission committees in the policy-shaping phase such as comitology committees, programme committees and other committees in special areas which is greater access than the candidate countries had. Furthermore, although it does not want to join the EU, it has closer ties with European states (especially the other Nordic states) than with any other states and is generally keen to strengthen cooperation with the EU and be as extensively involved in European integration as possible, short of full membership (Eiríksson 2004: 17 and 54-5). It is therefore likely that Iceland experiences some degree of socialisation.

However, unlike the EU member states, Iceland does not participate directly in EU decision-making, which might pose a similar legitimacy problem as encountered in the candidate countries, giving EU legislation a hint of foreign imposition. This can, for example, be illustrated by a comment made by Halldór Ásgrímsson, former Icelandic Minister of Foreign Affairs: “It is difficult for us to take over results in sensitive sectors when we have been excluded from the preparations” (EFTA Secretariat 2002: 7-8). In addition to the potential lack of legitimacy of EU legislation for non-member states, Iceland has been far less exposed to the EU’s rules, norms, practices and structures than the member states and is thus perhaps less likely than the member states to be willing to comply with EU policy.

3.3 Organisational capacity

Studies have also noted that lack of compliance can often be traced to administrative ineffectiveness or inexperience (Berglund et al. 2006: 713). For example, in a study on the transposition delay for most EU social directives in Germany, Greece, the Netherlands, Spain and the United Kingdom it was established that only in 42% of cases did member states transpose the relevant directives on time while 17.5% exceeded the deadline by more than 2 years. The need for inter-ministerial coordination and administrative inefficiency were found to be strongly associated with this transposition delay (Haverland and Romeijn 2007: 757).

Thus, whether or not transposition is accomplished with little delay can depend on the existence of administrative departments with the explicit task of ensuring transposition and whether these departments have the time, resources and expertise to
develop routines or standard operating procedures for doing so (Berglund et al. 2006: 692). In other words, political actors have to be capable of abiding by the law. That is, they must be able to take quick, effective and efficient decisions to facilitate speedy transposition of EU legislation (Berglund et al. 2006: 701). One illustration of this is that the countries with the most efficient government administrations such as the UK and the Nordic countries have the best transposition records even though they are generally considered some of the most Eurosceptic countries in the EU (Berglund et al. 2006: 713).

It is true that Iceland has an established and well-functioning democratic political system. However, as noted, Iceland has an extremely small administration. For example, in 2001 the number of people working in the Icelandic foreign service was a mere 150 as compared to 9,800 in France and 1,500 in Sweden (Thorhallsson 2004). The small size and limited capacity of the Icelandic administration made it difficult to cope with EU requirements, especially during the first years of membership (Lærgreid et al. 2004: 363-5). However, as time goes by governments generally develop the organisations and routines for more effective and swifter transposition (Berglund et al. 2006: 713). This is also the case for Iceland and it has been found that the Icelandic administration is slowly becoming more accustomed to dealing with EEA requirements (Thorhallsson 2004). Nevertheless, Iceland may be less able to deal effectively with the transposition and implementation of EU legislation than many larger states with greater resources.

3.4 Culture of compliance

Berglund et al. (2006) argue that, based on the assumptions of sociological institutionalism, actors are embedded in sets of institutions that influence their behavioural choices. Institutions can both be formal or informal sets of mutual expectations between people that have evolved into rule systems. These rules define what is expected of a particular actor in a specific situation. Many of these rules are followed automatically and unconsciously once the actors have been socialised into their community. (Berglund et al. 2006: 699) Sociological institutionalism thus emphasises norm-guided behaviour. One social norm can, for example, be respect for formal legal rules. The intensity of this norm may, however, vary between countries. If there is a strong tradition for law abidance in a member state, political and administrative actors will be more likely to consider it their duty to abide by the law, including the obligation to transpose European directives correctly and on time. (Berglund et al. 2006: 701)

A similar argument has been made by Falkner et al. (2005). In their extensive study of the transposition and application of six EU labour law directives in the 15 “old” member states, they observed that the states could be grouped into three different categories or “worlds” characterised by a particular transposition and implementation style or “compliance culture”. They found that in the group of countries belonging to the “world of law observance”, the compliance goal typically superseded other domestic concerns. In these countries, breaking EU law was not considered to be a socially acceptable. Even if there was a high degree of conflict between EU and national policy and domestic adaptation costs were high, transposition of directives was generally both timely and correct. Application and enforcement of national implementation laws was also largely successful as the transposition of laws tended to
be well thought out and adapted to the specific national circumstances. Furthermore, enforcement agencies and court systems in these countries were found to be equipped with sufficient resources to fulfil their tasks. Non-compliance by contrast occurred very rarely and only when fundamental domestic traditions or basic regulatory philosophies were at stake and these instances of non-compliance tended to be remedied rather quickly. The three Nordic member states (Denmark, Finland and Sweden) were grouped into this cluster. (Falkner and Treib 2008: 296-7) By contrast, Falkner et al. (2005) found that compliance did not come quite so easily in the other countries.

Although no study has yet been conducted on Iceland’s compliance culture, with respect to these three groupings Iceland is culturally most closely related to the other Nordic countries. Thus based on the findings that these countries exhibit a particularly strong tendency towards complying fully with EU requirements, it might be hypothesised that a relatively salient “culture of compliance” also exists in Iceland. Nevertheless, as we have also seen, Iceland’s lack of access to decision-making institutions is likely to increase adaptation costs. In addition, lack of involvement in EU level processes lessens the extent of international socialisation into EU norms which could undermine the legitimacy of EU rules and make voluntary compliance with EU policy less likely than in the member states. Furthermore, Iceland’s small administration might mean that it is less capable than most states to deal with EU requests. As adaptation costs are likely to be fairly high and socialisation and organisational capacity relatively weak, the EU’s coercive mechanisms will most likely have to be fairly frequently put to the test in Iceland even though this might be mitigated to some extent by a culture of compliance if Iceland follows the same pattern as the other Nordic countries. Iceland is thus essentially in a similar position to most other non-member states such as candidate countries and countries in the ENP that also lack access to EU decision-making institutions and often have weak administrations. A high degree of coercion is generally found to have been necessary to elicit compliance in these states. The next section gives a brief overview of the types and effectiveness of the EU’s coercive mechanisms in non-member states as opposed to its member states, as this will be helpful when it comes to evaluating the strength of the EU’s coercive mechanisms in Iceland.

4 Coercive mechanisms at work in candidate countries and member states

4.1 Eliciting compliance outside EU borders

The EU’s methods of eliciting compliance are generally aimed at tilting states’ cost/benefit calculations in favour of compliance. The extent to which it can do this has been found to depend to a large degree on the type of relationship it has with the implementing country. For example, because of substantial differences in the institutional context between member states and candidate countries, the cost/benefit calculations of compliance with EU policy vary considerably. It can be said that the EU’s coercive mechanisms are very strong with respect to the candidate countries.\footnote{This generally refers to the countries of Central and Eastern European (CEECs) from the time that they became credible potential members of the EU in the mid 1990s to the time of their accession in 2004 and 2007.}
The political and economic benefits of membership\(^\text{11}\) and the potential costs of exclusion create incentives for candidate countries to satisfy even enormous entry requirements. The EU thus has considerable leverage over these countries (Vachudova 2005: 259) and has accordingly followed a strategy of conditionality\(^\text{12}\) in which it set the adoption of its 80,000 page *acquis communautaire* as a condition that candidates had to fulfil in order to receive rewards such as trade and cooperation agreements and eventually full membership. Conditionality was thus the primary coercive instrument exercised by the EU to secure compliance with certain desired policy outcomes in the candidate countries (Hughes et al. 2004: 525).

This compliance mechanism proved highly effective in ensuring transposition of EU legislation. Before the EU spelled out its accession conditionality, some adoption of EU rules had occurred in the Central and Eastern European countries (CEECs). This was, however, patchy and selective (Schimmelfennig and Sedelmeier 2005a: 217-8). After the explicit formulation of conditionality, on the other hand, vast improvements in rule adoption were observed (Schimmelfennig et al. 2005: 50). In general, the benefits of joining the EU and the threat of exclusion provided a strong enough incentive to meet EU requirements even where these demands conflicted with other priorities, although adoption of EU rules did appear to be slower when domestic adaptation costs were high (Grabbe 2001: 1015; Jachtenfuchs and Kohler-Koch 2004: 110; Schimmelfennig and Sedelmeier 2004: 672).

Close monitoring was however necessary for transposition to occur and the candidate countries preferred a form of adoption that minimised their domestic costs unless they were subject to continuous and effective monitoring (Schimmelfennig and Sedelmeier 2005a: 217). Overall, the EU monitored the progress of the candidate countries carefully (Bretherton and Vogler 2006: 141) reporting on the applicants’ progress every year. The annual reports were used to decide whether to admit each country to further stages of the accession process so they were a powerful tool in EU conditionality (Grabbe 2002: 256-7 and 62). The candidate countries for the 2004 accession\(^\text{13}\) were thus generally subject to much more extensive Commission monitoring and control than the member states (Héri-tier 2005: 208-9) and as noted transposition was generally thought to have been highly successful. However, it should be borne in mind that EU rule adoption in the candidate countries may, in many cases, have consisted mainly of formal transposition without full and effective implementation (Schimmelfennig and Sedelmeier 2005a: 226). This is because implementation is more difficult to monitor and furthermore the CEECs were still at a very early stage of the adoption process when they were admitted to the Union. Therefore, it was primarily the formal, legislative adoption that could be observed rather the implementation (Schimmelfennig and Sedelmeier 2005a: 224).

\(^{11}\) As members, the countries would, for example, have access to the internal market, enjoy the protection of EU rules and gain a voice in EU policy-making (Vachudova 2005: 66).

\(^{12}\) In its simplest form conditionality links perceived benefits with the fulfilment of certain conditions (Grabbe 2002: 252). A strategy of conditionality has also been used by international financial institutions such as the World Bank and IMF linking development aid to demands concerning human rights and (liberal) democracy in recipient countries. These attempts have shown that asymmetry of power appears to be an important pre-condition for the functioning of conditionality. China is the clearest example of this, where security concerns and economic interests have led to a high Western tolerance for human rights abuse (Sorensen 1993:2).

\(^{13}\) Earlier rounds of accession were not subject to such extensive monitoring.
4.2 Inducing compliance in the member states

The EU can exert pressure on member state governments to implement EU policy in order to avoid facing infringement proceedings or being fined. However, in the member states, unlike the candidate countries, this is often not enough to tilt the cost/benefit balance in favour of compliance. Member states can, in other words, “rationally” afford to ignore EU legislation because, compared with the threat of being excluded from membership, non-compliance in the member states imposes relatively mild sanctions (Héritier 2005: 204-5).

The Commission is technically responsible for monitoring compliance with EU policies in the member states. It has the right to initiate infringement proceedings against member states that have failed to comply with their Treaty obligations which can culminate in the ECJ imposing fines (Börzel 2001: 806-8). Most authors have found that these mechanisms are not always strong enough for compliance or institutional adaptation to occur in the member states. Rather, existing domestic institutional arrangements and policy legacies are generally thought to play a larger role (Knill 2001: 22-24). For example, in his study of the Europeanisation of national administrations in Britain and Germany, Knill (2001) notes that there was a strong resistance in Germany to the Access to Information14 and EIA15. Britain also resisted implementation in the case of EIA while changes to comply with the Drinking Water Directive16 took place only after a delay of several years (Knill 2001: 3). Börzel (2000) also argues that implementation failure can be expected when there are high adaptation costs and no domestic advocates that compel public authorities to comply with incongruent policies (Börzel 2000: 141).

Although the Commission’s infringement proceedings and the fines imposed on member states by the ECJ can hardly be considered much of a deterrent when compared to the threat of being left out of accession negotiations, the EU has been able to drive member states to adopt policies through these methods. For example, Caporaso and Jupille (2001) found that the ECJ was able to restore Britain’s non-conformity with European gender equality laws, such as the Equal Pay Directive17 (Caporaso and Jupille 2001: 37-8). The Commission also initiated infringement proceedings against Britain for its highly selective implementation of directives on bathing and drinking water which culminated in several far reaching judgements by the ECJ. This forced the British government to implement costly remedial works (Jordan 2006: 236-7).

Panke (2007) has argued that infringement proceedings can be important for restoring compliance but they are only effective if domestic societal resistance is weak and the “shadow of sanctions is intense” (Panke 2007: 847). Furthermore, some Commission officials estimate that no current member state correctly implements more than 80% of EU regulations (Grabbe 2002: 250). This seems to highlight the relative weakness

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14 Council Directive on the freedom of access to information on the environment (90/313/EEC)
of the EU’s coercive mechanisms over its member states as opposed to the candidate countries. However, it should be born in mind that member states might be more likely to have lower adaptation costs, higher degrees of socialisation and greater administrative efficiency which could mean that they are less in need of strong coercion. Nevertheless, it has been noted that the candidate countries transpose EU legislation more extensively than the member states. This can probably be traced to the strength of the coercive mechanisms which the EU has over countries aspiring to membership. As EU membership is thought to entail immense geopolitical, social and economic benefits, the prospect of membership along with the threat of exclusion from accession negotiations becomes the dominant incentive for compliance. So much so that it outweighs all other considerations. Member states on the other hand are free from this pressure. In the next section, the focus turns to the process of EU rule adoption in Iceland through the EEA Agreement and the consequences of non-compliance, where certain comparisons can be drawn both between Iceland and the member states and the candidate countries.

5 Coercive mechanisms in Iceland

It is generally agreed that the EEA Agreement, has had a wide-ranging impact on the Icelandic legal system (Spanó 2007: 28). Approximately one fifth of all legislation currently adopted by the Icelandic Parliament can be traced to EEA membership, which implies active adjustment of national policy to bring it into line with EU law. Legislation in traditionally domestic policy areas is increasingly initiated and decided at the European level and few policy sectors are unaffected by the EEA Agreement. In some areas, such as environment, and food safety, almost all national legislation is now initiated by the EU (EFTA Secretariat 2002: 29). But how does this legislation become part of the legal structure of a non-member state such as Iceland? And what happens if dominant state actors oppose an EU initiative or the national administration is incapable of implementing it properly? (It was established in section 3 that these scenarios are not unlikely.) In order to evaluate the strength of the EU’s coercive mechanisms in the Icelandic context, this section examines how legislation flows from the EU into the EEA Agreement and finally becomes part of Iceland’s national legal system, paying particular attention to the tools at the EU’s disposal for ensuring compliance at each stage of the process.

To begin with, it is necessary to note that the power relationship between Iceland and the EU can be considered extremely asymmetrical. The vast majority of Iceland’s trade is with the EU and Iceland is therefore highly dependent on the EU economically. In 2005, 75% of all exports from Iceland went to the EU while 62% of all imports came from member states of the Union (National Statistical Institute of Iceland as cited in Forsætisráðuneytið 2007: 14). Most would agree that the EEA Agreement has been highly beneficial for Iceland and particularly the Icelandic economy as it has led to increased economic stability and growth (Einarsson 2003: 97). Losing access to the EU’s internal market is therefore generally not considered an option by the Icelandic government or by the increasingly influential Icelandic businesses elite whose success in recent years is largely attributed to membership of the EEA. As the material interests invested in participation in the single market increase so to do the costs of exclusion.
The EU on the other hand probably does not attach much significance to the EEA Agreement. When the Agreement was negotiated in the early 1990s between the then seven EFTA states and the then 12 member states of the European Community, EFTA included the EC’s largest trading partners (Einarsson 2003: 89; Wallis 2002: 7). Today, however, only the three smallest EFTA states remain party to the EEA Agreement while the EU has grown to include 27 states. This dependence of Iceland on the EEA alongside the EU’s relative indifference to it potentially gives the EU considerable leverage over Iceland, similar to that which it has over the candidate countries. Whether or not the EU is able to use this leverage effectively will most likely depend on the institutional set up of the EEA and the credibility of the threat of exclusion from the internal market.

5.1 Incorporation of EU legislation into the EEA Agreement

Although the EFTA-3 are required to adjust their legal systems to EEA relevant legislation, the EEA Agreement has various clauses to allow them to participate in EU cooperation without giving up their sovereignty, at least not in the de jure sense (Spanó 2007: 28 and 31). For example, legislation does not automatically become part of the EEA Agreement once it has been passed by the EU. After an act, which is likely to be EEA relevant, has been adopted by the EU a “standard sheet” containing all vital information on the relevant act is prepared by the EFTA Secretariat. The standard sheet is then sent to experts in the capitals of the EFTA states to evaluate whether the act should be considered EEA-relevant, whether it is necessary to seek exemptions or adaptations, whether the act is likely to require legislative change at the national level and whether this will imply increased costs (EFTA Secretariat 2008c; Forsætisráðuneytið 2007: 60).

After having been examined at the national level, these pieces of legislation are then reviewed and discussed by EFTA-3 experts and officials in EFTA working groups and subcommittees. The EFTA Standing Committee, made up of EFTA-3 Ambassadors and representatives from the Ministries of Foreign Affairs, then shapes a final joint position of the EFTA countries, as the EFTA-3 are required to speak with a united voice when deciding to incorporate an act into the Agreement. Finally, the EFTA-3 Ambassadors to the EU meet with representatives of the Commission in the EEA Joint Committee on a monthly basis to decide whether EU acts are relevant to the EEA countries and if so how they should be incorporated into the EEA Agreement (Forsætisráðuneytið 2007: 30; Thorhallsson and Ellertsdottir 2004: 99). All decisions

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18 At the time of negotiation the EFTA side included Austria, Finland and Sweden who joined the EU soon after the EEA Agreement came into effect and Switzerland who rejected the EEA Agreement in a referendum and structures its relations with the EU through bilateral agreements.
19 This refers to the EFTA parties to the EEA Agreement (Iceland, Norway and Liechtenstein).
20 DG RELEX has a special office that deals with the EEA and relations with the EFTA Secretariat and prepares participation in the EEA Joint Committee. Representatives of EU member states may also attend these meetings but seldom do (Thorhallsson and Ellertsdottir 2004: 99).
21 The EEA Joint Committee is responsible for managing the EEA Agreement. It is a forum in which decisions are taken by consensus to incorporate EU legislation in the EEA Agreement. The Committee meets once a month and is made up of the EEA EFTA state’s Ambassadors to the EU, representatives of the European Commission and EU member states. Four Subcommittees on the free movement of goods, free movement of capital and services, free movement of persons, and horizontal and flanking policies, assist the Joint Committee and they are in turn assisted by expert and working groups (EFTA Secretariat 2006; EFTA Secretariat 2005; EFTA Secretariat 2007b).
by the Joint Committee are taken by unanimity between the EFTA-3 and the Commission (EFTA Secretariat 2008c). If the decision is affirmative, the acts are listed in the relevant Annex to the Agreement. Although decisions in the Joint Committee are taken by unanimity, it will be argued in the following sections that in practice the EFTANs have little alternative but to abide by the Commission’s wishes during this stage of the adoption process, although the EU’s leverage dwindles at later stages of the process.

5.2 Exemptions, adaptations and the principle of homogeneity

According to Article 102 of the EEA Agreement, the Annexes to the Agreement must be as similar as possible to the original European legislation. The principle of maintaining homogeneity in the EEA means that there is considerable pressure on the contracting parties to submit fully to all EEA-relevant legal acts (Björgvinsson 2006: 59). Nevertheless, certain exemptions and adaptations can sometimes be made for the EFTA-3 states (Björgvinsson 2006: 61-62). Before meetings of the Joint Committee, the EFTA-3 can attempt to negotiate derogations or exemptions from the rules at the working group or subcommittee level.

It is difficult to negotiate adaptations, especially if similar requests have been made by EU member states and refused. However, substantive adaptations have on occasion been made for Iceland, for example, in relation to aviation security. Because of Iceland’s isolated geographical position, domestic airports in Iceland were exempt from various security requirements and the EU’s increased security regulations only apply in Iceland for international flights (Forsætisráðuneytið 2007: 32). Another special exemption was made for Iceland in the area of Environmental policy where it was agreed that Iceland does not have to submit to as strict regulations regarding the burning of rubbish because of the sparse population density. Various other adaptations have also been made to legislation on animal health, energy use, safety regulations in fishing vessels and daylight savings (Forsætisráðuneytið 2007: 32).

In order for Iceland to receive these exemptions and adaptations, it is necessary to demonstrate convincingly why conditions in Iceland are different from those in the EU member states. This requires much preparatory work and it is far from certain that an agreement will be reached (Forsætisráðuneytið 2007: 33). Experience has generally shown that the scope for special adaptations is fairly restricted (EFTA Secretariat 2002: 7-8). Especially as the EU has become larger and more heterogeneous, states are finding it more difficult to gain attention and understanding for particular sensitivities and the Commission has become less flexible and less willing to accommodate special concerns of the EFTA through adaptations, exceptions and transition periods as it may be disinclined to create precedents for exceptions to any given piece of legislation (Júlíusdóttir and Wallis 2007: 6).

5.3 The “guillotine clause”

If one of the EFTA-3 finds a piece of EEA relevant legislation unacceptable and no adaptations or exemptions can be agreed, the EEA Agreement gives the EFTA-3 the right to refuse the incorporation of the act into the EEA Agreement in Joint Committee meetings. However, this veto would have grave consequences for the continuation of the EEA Agreement as according to Article 102 of the Agreement, a
refusal to adopt legislation could be interpreted as a suspension of part of the Agreement or the Agreement in itself by the EU (Forsætisráðuneytið 2007: 34; Thorhallsson and Ellertsdottir 2004: 99). This clause gives the EU considerable coercive leverage over the EFTA-3 when it comes to incorporating legislation into the EEA Agreement as the threat of suspension of the Agreement, in whole or in part, makes it difficult, if not impossible, for the EFTA-3 states to use this right.

Article 102 states that if an agreement on incorporating a piece of EU legislation into the EEA Agreement cannot be reached, the EEA Joint Committee shall first examine “all further possibilities to maintain the good functioning of this Agreement” with the view of reaching an agreement before any suspension of the EEA Agreement takes place. This conciliatory process has once been invoked by the Commission regarding the incorporation into the EEA Agreement of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. This matter was not solved until the end of October 2007; a year after the process had begun. During this period, the Joint Committee was running the risk of the relevant Annex of the EEA Agreement being suspended, as the Article stipulates (Júlíusdóttir and Wallis 2007: 11). In this case Iceland and Liechtenstein thought the directive overstepped the legal boundaries of the EEA Agreement and should not be considered EEA relevant. Norway did not share this view and, like the Commission, wanted to incorporate the act into the Agreement. In the end, Iceland and Liechtenstein backed down and the directive was incorporated into the Agreement and is currently pending approval by the Icelandic Parliament (Alþingi 2008). It is difficult to say what the results of this disagreement would have been if Norway had sided with Iceland and Liechtenstein. Nevertheless, both the fact that Article 102 has so seldom been put to the test and the results in favour of the EU once it was seem to highlight the strength of the EU’s leverage when it comes to incorporating acts into the EEA Agreement.

Thus, in sum, the EEA Agreement, which gives Iceland its much-needed access to the internal market, can relatively easily be revised through the guillotine clause if an EFTA state refuses to incorporate a piece of legislation into the EEA Agreement. Because of this threat of exclusion, Iceland, as well as the other parties to the EEA Agreement, are under very strong pressure to agree to Joint Committee decisions to incorporate acts into the EEA Agreement and are unlikely to refuse such action no matter how inconvenient it is.

### 5.4 Legal transposition

Although Iceland is under great pressure to accept Joint Committee decisions, the EFTA-3 have not technically transferred binding legislative powers to the EEA Joint Committee and the national parliaments of the EFTA-3 have the right to reject the adoption of regulations and directives incorporated into the EEA Agreement by the Joint Committee. Therefore, once the Joint Committee has decided that a piece of legislation should be taken into the EEA Agreement the EFTA-3 must adopt the relevant act into their legal systems before they can take effect (EFTA Secretariat 2007; Forsætisráðuneytið 2007: 30-31). Thus unlike in the member states, regulations are not directly applicable but are first incorporated into the EEA Agreement by the Joint Committee and then “made part of the internal legal order of the Contracting
Parties” (Spanó 2007: 29-30). Much like in the member states, directives give domestic authorities more flexibility as they are only binding in their aims. Article 7b of the EEA Agreement states that an act corresponding to a directive shall “leave to the authorities of the Contracting Parties the choice of form and method of implementation”. Similar to the EU member states, the EFTA-3 therefore have to decide whether legislative changes are necessary and if so which changes are required in order to fulfil the objectives of the directive. For example, they have to ensure that no other legislation exists which contradicts the aims of the directive. (Spanó 2007: 30) This is done within each country’s relevant administrative institutions.

It is important to note that new EEA-relevant directives do not always require legislative change if their objectives are already deemed to be complied with by Icelandic law (Björgvinsson 2006: 93-94). In fact, the majority of legal acts incorporated into the EEA Agreement do not require adoption by Alþingi (the Icelandic Parliament) (Forsætisráðuneytíð 2007: 57). However, about 10% do demand changes to existing national law. For example, in the period 1994-2004, 2527 legal acts were incorporated into the EEA Agreement and 271 pieces of legislation were adopted by Alþingi that can be traced directly or indirectly to the EU, which constitutes about 21% of all legislation adopted by the Icelandic Parliament during that period (Forsætisráðuneytíð 2007: 57-58). In the period 1992-2006, Alþingi passed 1656 pieces of legislation, 285 (17.2%) can be traced directly to the EEA Agreement and 358 (21.6%) indirectly to that Agreement (Ævarsdóttir and Ólafsdóttir 2007: 2). This is quite a substantial proportion of the total legislation passed by Alþingi even if it is not a large portion of the total number of acts incorporated into the EEA Agreement. In fact it is a similar portion to that adopted by member state parliaments which can be traced to EU membership (Moravcsik 2005: 365).

In cases where there is conflict between EU and national law, the Minister of Foreign Affairs or the Minister in the relevant policy area submits a legislative proposal to Alþingi for approval. Iceland must then notify the EFTA Secretariat once the objectives of the directive have been made part of the national legal system and the Secretariat passes the information on to the other members of the EEA Joint Committee (Björgvinsson 2006: 58). Most Joint Committee decisions needing parliamentary approval should be agreed within six months. If notification has not been received by the Joint Committee within that period, the decision is applied provisionally pending the fulfilment of national constitutional requirements unless one of the EFTA-3 notifies the other parties that such provisional application cannot take place (EFTA Secretariat 2006: 13).

Notification of a decision by national parliaments not to transpose EEA relevant legislation would have the same effect as vetoing a Joint Committee decision to incorporate legislation into the EEA Agreement, i.e. the suspension of part of the Agreement or the Agreement in itself. Therefore, much like refusing to incorporate
legislation into the EEA Agreement, explicit refusal to transpose legislation into national law is generally not a viable option for the EFTA-3 and again seems to highlight the EU’s coercive leverage during this phase of the adoption process. However, importantly, the threat of exclusion is only applicable if the national parliaments overtly announce the refusal to adopt a piece of legislation. Transposition may, however, be delayed by the national parliaments without fear of exclusion from the internal market. Furthermore legislation might be incorrectly transposed or poorly implemented without the threat of exclusion applying. Nevertheless, there are some mechanisms in place for ensuring both timely and correct transposition as well as full implementation. These will be examined below.

5.5 EFTA infringement procedures

Article 104 of the EEA Agreement states that the Contracting Parties shall take the necessary steps to ensure the implementation and application of the decisions taken by the Joint Committee (EFTA Secretariat 2006: 5). However, as the EFTA-3 do not have representatives in the Commission, it was not thought fitting during negotiations of the EEA Agreement that the Commission should be in charge of monitoring compliance within the EFTA-3 (Einarsson 2003: 93). Thus, again in order to retain at least the pretence of de jure sovereignty, the EFTA states were not subject to direct monitoring from EU institutions. Rather, in order to ensure the uniform implementation and application of European rules in all EEA states a two-pillar system was set up whereby the EU member states are supervised by the European Commission and the European Court of Justice (ECJ) and EFTA states by the EFTA Surveillance Authority (ESA) and the EFTA Court. The EFTA institutions are made up of officials from the EFTA states, so in a way the EU loses some control over the monitoring process once acts have been incorporated into the EEA and are pending transposition and implementation at the national level.

ESA is led by a College of three members, one from each of the EFTA-3. The College is appointed by common accord of the governments of the EFTA states. It is formally independent of other institutions, as well as of the EFTA states and takes decisions according to the majority vote of its members. ESA has powers corresponding to those of the Commission to monitor the fulfilment of the EFTA states’ obligations under the EEA Agreement ensuring that European legal acts are properly transposed and implemented in the EFTA-3. There is close co-operation between the European Commission and ESA. They exchange information and consult each other on general surveillance policy questions and on individual cases. If there is disagreement between the two, either of them can refer the matter to the EEA Joint Committee. (EFTA Secretariat 2008b; EFTA Surveillance Authority 2008d)

Where an EFTA state fails to comply with EEA law, ESA has the power to issue infringement proceedings which are in most respects similar to those issued by the Commission in cases of member state non-compliance. Before infringement proceedings are initiated, ESA generally attempts to ensure compliance in informal discussions with representatives of the respective state and in practice the majority of problems identified by ESA are solved as a result of these exchanges. However, if ESA considers that a possible infringement of EEA law warrants the opening of an infringement procedure, it addresses a letter of formal notice to the state concerned, requesting that it adopt a position on the points which ESA has raised by a particular
date. In the light of the reply, or absence of a reply, from the EFTA state, ESA may decide to address a reasoned opinion to that state which sets out the reasons why it considers there to be an infringement of EEA law and calls on the EFTA state to comply within a specified time period (normally two months). The purpose of this is to determine whether there is an infringement and, if so, whether the matter can be resolved without being taken to the EFTA Court. In the light of the reply to the reasoned opinion, ESA may decide not to proceed further, for example, where credible assurances have been provided as to the state’s intention to amend its legislation or administrative practice. Most cases can be resolved before going to the Court. (EFTA Surveillance Authority 2008c)

If, however, the state fails to comply with the reasoned opinion, ESA may decide to bring the case before the EFTA Court which will generally rule on a case brought by the Authority within a year of the submission of the application (EFTA Surveillance Authority 2008c). The EFTA Court is again part of the two-pillar system which was set up by the EEA Agreement so that the institutions of the EU would not have direct power over the EFTA-3 and the EFTA-3 states could retain de jure sovereignty. The EFTA Court operates in parallel to the EJC. It consists of three judges, one from each of the EFTA states party to the EEA Agreement. It has jurisdiction with regard to the EFTA-3 and is mainly competent to deal with infringement actions brought by ESA against any of the EFTA-3 with regard to the implementation, application or interpretation of the an EEA rule.26 (EFTA Secretariat 2008a)

At the close of the procedure, the Court delivers a judgment stating whether or not there has been an infringement. The EFTA Court does not, however, have the same authority as the ECJ as it does not have the power to issue binding decisions, only recommendations and advisory opinions (Björgvinsson 2006: 162). The Court can, therefore, neither formally annul a national provision which is incompatible with EEA law, nor force a national administration to respond to a request of an individual, nor order the state to pay damages to an individual adversely affected by an infringement by the state of EEA law. Nevertheless, it follows, from Article 33 of the Surveillance and Court Agreement, that it is the duty of an EFTA state against which the EFTA Court has rendered judgment to “take whatever measures are necessary to comply with the judgment, and in particular to resolve the dispute, which gave rise to the procedure”. If the state does not comply, the Authority may again bring the matter before the EFTA Court (EFTA Surveillance Authority 2008c). It must be said that these sanctions seem fairly weak, especially in comparison with the threat of exclusion from the internal market.

5.6 How effective are these procedures?

In order to get some idea of the effectiveness of these mechanisms, it is interesting to explore ESA’s figures on the monitoring of transposition and infringements proceedings. Twice a year ESA issues a report on the adoption of EEA legislation in the EFTA-3 called the Internal Market Scoreboard for the EEA EFTA States. It is designed to “measure performance and to encourage timely transposition of EEA rules” by the EFTA-3. Furthermore, it contains information concerning infringement

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26 The EFTA Court is also responsible for the settlement of disputes between two or more EFTA states, for appeals concerning decisions taken by the EFTA Surveillance Authority and for giving advisory opinions to courts in EFTA-3 on the interpretation of EEA rules.
proceedings commenced by ESA against the EFTA states for failure to transpose EEA rules correctly and on time, and for failure in applying the rules correctly (EFTA Surveillance Authority 2008b). ESA’s Scoreboard is issued in parallel with the Commission’s Internal Market Scoreboard on the EU member states, which contains comparable information.

According to ESA’s scoreboard published in February 2008, Iceland had announced the transposition of 97.8% of the legislation it was required to adopt through the EEA Agreement by the end of the year 2007 (EFTA Surveillance Authority 2008a). Although 2.2% is not a high percentage of non-transposition it is still significantly higher than the average in the EU member states. The European Council has set an interim target of 1.5% as the maximum transposition deficit and the average deficit in the member states is currently 1.2%. Therefore, Iceland, exceeds both this maximum limit and the EU average and is currently ranked 27th out of the 30 EFTA and EU members of the EEA (EFTA Surveillance Authority 2008a) ahead of only Portugal, Luxembourg and the Czech Republic. The other EFTA states were closer to the EU average, Norway’s transposition deficit was 1.3 and Liechtenstein’s was 1.6 (EFTA Surveillance Authority 2008a).

These figures seem to indicate that Iceland is not particularly afraid of delaying the process national transposition of EEA legislation. In fact, pieces of EU legislation are sometimes delayed in the national parliaments for up to two years and input is sought from major interest groups etc. (Einarsson 2003: 100-01) This might be because the threat of the discontinuation of the EEA Agreement only applies if transposition of the legislation is expressly refused. Delays on the other hand are only subject to the infringement proceedings outlined above. Nevertheless, much like in the member states, detection rates for non-transposition are high due to constant monitoring (Einarsson 2003: 100-01). It should be noted here that regulations are technically not directly applicable in Iceland or Norway (unlike in the EU member states and Liechtenstein) and thus also need to be transposed into national legislation in order to be complied with. However, unlike with directives, the EFTA-3 do not have a specific obligation to notify the Authority of their incorporation into national law. Nevertheless, ESA generally requests that they inform it of the national measures taken for the incorporation of regulations (EFTA Surveillance Authority 2008a) and therefore the transposition of regulations is also fairly well monitored. Thus, in the end the legislation is generally transposed sooner or later in the EFTA-3 although this can take a long time and sometimes only happens after infringement proceedings have been commenced.

It is important to bear in mind that the transposition figures do not say anything about the quality of the national legislation, i.e. whether the national legislation actually meets all the objectives of the EU legislation (EFTA Surveillance Authority 2008a) or whether it has been implemented properly. Infringement cases can also be issued due to incorrect transposition or implementation of EEA provisions in situations in which ESA, after having acknowledged transposition of a directive, later concludes that the national legislation does not conform to the requirements of the EEA legislation or that the state in question has not been putting the rules into practice. (EFTA Surveillance Authority 2008a) However, the rate of detection of these instances is questionable as this is much more difficult and time and resource consuming to monitor.
As the following figures show, far more infringement proceedings are issued against the EFTA-3 for non-transposition than incorrect transposition or implementation. For example, on 31 October 2007, a total number of 152 infringement cases were being pursued by ESA against the EFTA-3. Out of the 152 cases, only 30 cases concerned incorrect application of internal market rules whereas 122 cases concerned non-transposition of directives or regulations (EFTA Surveillance Authority 2008a). Most of these cases of non-transposition were against Iceland. In total Iceland had 105 infringement proceedings pending for non-transposition of regulations and directives. Broken down further, Iceland had 13 letters of formal notice, 5 reasoned opinions and 1 referral to the EFTA Court pending in October 2007 for non-transposition of directives. (EFTA Surveillance Authority 2008a) During that same period it had 67 letters of formal notice and 19 reasoned opinions pending due to non-transposition of regulations. On the other hand, Iceland only had 7 letters of formal notice and 1 reasoned opinion pending due to incorrect transposition or faulty implementation (EFTA Surveillance Authority 2008a). Thus the vast majority or infringement proceedings refer to non-transposition rather than incorrect transposition or implementation.

Interestingly, ESA has initiated infringement proceedings over Iceland and Norway more often than EU regulatory agencies have over two Nordic EU members, Sweden and Denmark (Lærgreid et al. 2005: 24) and Iceland and Norway have been brought before the EFTA Court a similar number of times as Sweden and Denmark have been taken to the ECJ (Lærgreid et al. 2005: 25). This seems to indicate either that ESA is a stricter watchman than the Commission or that the EFTANs are, if anything, more lax than their EU counterparts when it comes to complying with EU law.

As noted above, these figures only refer to the infringements that have been detected. There is reason to believe that at least some non-compliance, particularly with respect to incorrect transposition and implementation, occurs without detection. This is, however, extremely difficult to gauge, particularly as compliance with EU policy in Iceland has not been subject to much academic scrutiny. One of the few, if not only studies that exists on the subject is Guðrún Rögnvaldsdóttir’s MPA dissertation which focuses on the implementation of the New Approach in Iceland. The New Approach, defined in Council Resolution of May 1985, has the purpose of ensuring that products that meet certain harmonised standards have free market access to the entire internal market in line with the principle of mutual recognition. As the EEA entails membership of the internal market, Iceland and the other EFTA parties to the EEA Agreement are required to adopt all legislation on the four freedoms including that which enables the free movement of goods. (Rögnvaldsdóttir 2006: 9-10)

The New Approach contains 22 directives that put forward certain basic essential requirements for a type of product e.g., protection of health and safety, that goods must meet when they are placed on the market. Then European standards bodies such as the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI), draw up the corresponding technical specifications meeting the essential requirements of the directives, compliance with which will provide a presumption of conformity with the essential requirements. Such
specifications are referred to as “harmonised standards” (European Commission 2008).

When a European standard has been adopted, all member states must confirm it as a national standard and revoke all other contradictory standards in order to ensure harmonisation in the entire EEA (Rögnvaldardóttir 2006: 22). An Icelandic manufacturer of a product which falls under the New Approach should in this way be able to assume that if his products meet Iceland standards they should also meet the standards of all countries within the EEA and thus have access to the entire internal market. However, if these standards are not adopted or implemented in the correct manner at the national level, manufacturers cannot be sure that their product meets the harmonised standards which leads to legal uncertainty. (Rögnvaldardóttir 2006: 9-10)

Rögnvaldsdóttir (2006) explored how each of the 22 directives related to the New Approach was implemented in Iceland. Her findings were that compliance was lacking with respect to nearly all of the directives. In comparing the text of the directives and Icelandic law, she found that many of them had not been transposed properly into Icelandic law. In other cases, implementation was faulty (Rögnvaldardóttir 2006: 3). In fact, only one of the 22 directives falling under the New Approach was fully complied with, i.e. a manufacturer could be sure that there was harmonisation between Icelandic law and other EEA countries and that if his products met those standards it would enjoy free market access. The other directives either had not transposed the harmonised standards under the directive into national standards or even not transposed the original directive correctly or at all. (Rögnvaldardóttir 2006: 86-7)

Rögnvaldsdóttir (2006) notes that the most likely explanation for failure to properly implement the New Approach in Iceland is that in Iceland there is little tradition for standardisation. This means that EU legislation entailed a level of policy incongruence and policy makers were therefore reluctant or could not be bothered to implement it. Furthermore, production in the fields that fall under the New Approach is limited (with a few exceptions) and participation of Icelandic companies in the European standardisation is very almost non-existent in the areas which fall under the New Approach. Therefore there was little pressure on domestic authorities to correctly implement EU policy in these areas. This means that the directives, which are also highly technical and complicated, are not given priority in their respective ministries (Rögnvaldardóttir 2006: 91). In other European states, where industry is strong, companies expect their governments to correctly implement European standards. Interest groups hence have a strong surveillance function, which is lacking in Iceland with respect to the New Approach (Rögnvaldardóttir 2006: 92)

This case indicates that Iceland does not appear to be subject to very intensive scrutiny regarding the correct transposition or implementation of EU legislation and the extent to which ESA watches over the quality of the implementation of the EEA legislation in Iceland, at least in this field, must be considered fairly limited. ESA reviews the Icelandic laws which have been made to put EU legislation into effect at the national level but does not seem to have time or resources to look closely at their content or implementation (Rögnvaldardóttir 2006: 90) The transposition of legal acts and their implementation can therefore easily be faulty without ESA knowing about it or doing anything about it (Rögnvaldardóttir 2006: 90). The implementation of the
New Approach demonstrates the weakness of the EU’s coercive mechanisms in ensuring full compliance in Iceland, at least when it comes to correct transposition and implementation of EU legislation.

5.7 Tentative conclusions and plans for further research

Statistics show that both non-transposition of EU legislation and infringement proceedings are relatively frequent occurrences in Iceland in comparison to the EU member states, which indicates that compliance is somewhat lacking in Iceland. Statistics on transposition records and infringement proceedings are, however, problematic as they only cover cases of non-compliance which have been detected. As in the member states, the detection rate is in all likelihood rather high for non-transposition while correct transposition and implementation are harder to monitor. It is, therefore, difficult to estimate the amount of non-compliance that goes undetected in Iceland and impossible to compare actual non-compliance rates with other states. A recent study of Iceland’s implementation of the New Approach does however show that cases of undetected non-compliance definitely do exist.

On the whole, the evidence we do have seems to indicate that Iceland behaves more like a member state than a candidate country when it comes to complying with EU policy. Moreover, it appears to act like a fairly “badly behaved” member state. Some of the reasons for Iceland’s relative reluctance to comply may be traced to high adaptation costs, or lack of socialisation and weak administrative capacity as outlined in section 3. It does not appear that the EU’s coercive mechanisms are strong enough to counter these factors in all cases. This can probably be traced to the institutional set up of the EEA Agreement. At first glance it would seem likely that Iceland should behave more like a candidate country because the EEA Agreement has an inbuilt threat of exclusion much like the accession negotiations. However, for the candidate countries the threat of exclusion was imminent unless they fully transposed the required EU legislation. For Iceland on the other hand, the threat of exclusion only applies to the actual decision to adopt legislation into the EEA Agreement but not to the effective transposition and implementation of EU law at the ground level.

The EU’s coercive mechanisms for ensuring compliance thus only seem to be strong enough to induce incorporation of legal acts into the EEA Agreement but not necessarily correct adoption and application at the national level. This is probably because transposition delays, incorrect transposition and implementation failure only incur relatively mild sanctions, at least in comparison to the threat of discontinuation of the EEA Agreement and exclusion from the internal market. The mechanisms for monitoring compliance in the EFTA-3 and the infringement procedures to deal with non-compliance are in most respects similar to those used by the EU in its member states. While the European Commission and Court of Justice hold the competencies for monitoring and sanctioning non-compliance in the member states, in EFTA these competencies are delegated to the EFTA Surveillance Authority and the EFTA Court. Thus, EU is not directly involved in monitoring compliance at the national level in the EFTA states. Rather, the EFTA states are responsible for monitoring themselves. This may to some extent further diminish the deterrent from non-compliance, although this deserves further research. Another interesting finding is that Iceland appears to be the most “badly behaved” EFTA state as the statistics on non-transposition and infringement proceedings in Norway and Liechtenstein are generally lower than in
Iceland and more on par with the average member state. The possible reasons for this also merit further attention.

Although a relatively dark picture has been painted of Iceland’s compliance record, it should not be forgotten that the majority of EU legislation is most likely transposed and implemented properly in Iceland. Just not as well as in most other countries it would seem. Subsequent research is planned in which Iceland’s compliance with six EU directives and regulations in the areas of social, environmental and energy policy will be examined in a detailed case study approach. This research will attempt to address the above mentioned questions as well to gauge the motives and attitudes that lead Icelandic state actors to comply/not comply with EU policy.

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