25 January 2018

The European Economic Area: a two-pillar system

Christian Frommelt
christian.frommelt@liechtenstein-institut.li

The EU’s ‘Privileged Partnerships’ with its Neighbours: An Institutional Perspective
College of Europe, Bruges
Overall questions related to the conference

- Which are the institutionalised arrangements for integration into and cooperation with the EU in the EEA?
- What are the major advantages and shortcomings?
- What lessons can be drawn from an institutional perspective regarding ‘privileged partnerships’?
Analytical dimensions

- Why have the EU and the EEA EFTA states agreed on the EEA’s institutional architecture?
- How well does the EEA’s institutional architecture function?
- How do the institutional arrangements contribute to the overall functioning of the EEA?
- How inclusive is the institutional architecture of the EEA?
Requirements for governance of an international treaty
Elements of institutional arrangements

The institutional arrangements of an agreement between the EU and a non-member state shall ensure ...

- its access to EU policy-making;
- ongoing management of the agreement;
- supervision and enforcement of the agreed policies;
- dispute settlement;
- the enforcement of dispute settlement.
Objectives of institutional arrangements

An international agreement has to be effective by ...

- avoiding legal uncertainty and regulatory fragmentation;
- establishing a continuous political dialogue;
- adapting to changes in the political environment;
- mobilising the required resources.
From the perspective of the non-member state

The institutional arrangements of an agreement between the EU and a non-member state shall limit the extent …

- to which the non-member state has to pool its sovereignty;
- to which the non-member state has to delegate decision-making authority to new (non-intergovernmental) institutions.
From the perspective of the EU

The institutional arrangements of an agreement between the EU and a non-member state shall preserve ...

- the integrity of the Single Market;
- the integrity of the EU’s legal order;
- the autonomy of the EU’s decision-making.
The EU’s perspective: example judicial bodies
(Source: TF-50, 19 January 2018)

- Dispute settlement may not bind EU, internally, to a particular interpretation of EU law
- Judicial body may not interpret provisions in substance identical to EU law
- Joint Committee decisions must not affect ECJ case-law
- No powers to rule on respective competences of EU and member states
- No organic links (no judges sitting in double capacity)
- ECJ rulings must be binding in any case
Basic institutional features of the EEA
Two-Pillar EEA Structure

Iceland
Liechtenstein
Norway

EEA Council

Council
Presidency & EEAS

European External
Action Service
(EEAS)

EEA Joint Committee

European Commission

EEA Joint
Parliamentary
Committee

European Court of
Justice

Committee of MPs
of the EFTA States

EEA Consultative
Committee

European Parliament

EFTA Standing
Committee

EFTA Surveillance
Authority

EFTA Court

EFTA Consultative
Committee

Economic and
Social Committee
Challenges of the EEA’s institutional framework

- Far-reaching scope of the EEA Agreement
- Four freedoms and numerous horizontal and flanking policies
- So far 11’000 EU legal acts have been incorporated into the EEA Agreement since 1992
- More than 9’700 acts incorporated by decisions of the EEA Joint Committee
- ESA has to monitor implementation status of over 4’000 directives and regulations in force
EEA Governance
Modes of EEA decision-making [1]

- No EEA-level policy coordination
- Intergovernmental coordination within the EEA JC
  - Exclusive decision-making by EEA JC
  - Exemption for individual EEA EFTA state possible
  - No threat of suspension
- Intergovernmental cooperation within the EEA JC
  - Exclusive decision-making by EEA JC
  - Obligation to speak with ‘single voice’
  - (Potential) suspension of affected parts of EEA Agreement in case of non-incorporation
Modes of EEA decision-making [2]

- Quasi-supranational centralisation within the EFTA pillar
  - Decision-making by ESA

- Quasi-supranational centralisation across EU and EFTA pillars
  - Decision-making by ESA based on draft enacted by EU institutions

- Subordination to the EU pillar
  - Exclusive decision-making of EU institutions
Deepening in the EEA: mechanism

- **Within EEA EFTA pillar:**
  - Transfer of decision-making power from the EEA EFTA states to EEA EFTA institutions

- **Across EU and EEA EFTA pillar:**
  - EU specific patterns of governance spill over into the EEA
  - EEA decision-making is tied more closely to EU decision-making

- **Functionalist logic but various players**
  - EFTA institutions
  - EEA EFTA states
  - Businesses of the EEA EFTA states
Conditions of effective external differentiation

Note: Period of analysis 1995-2015 (EEA JCD); 1994-2014 (EU acts); only directives and regulations; share of incorporated acts (y-axis); time to incorporation in days (x-axis)
Assessment of the EEA institutional framework

- High institutional ambiguity and complexity
- Policy-specific modes of governance
- Wide range of decision-making authority

EEA has transcended narrow confines of its initial conceptualisation as an agreement under international law

Two-pillar structure has been filled with a multitude of informal and formal ad hoc rules
Discussion
Why have the EU and the EEA EFTA states agreed on the EEA’s institutional architecture?

- Institutional arrangements depend on ...
  - extent of integration
  - properties of integrated policies
  - policy-specific Governance in the EU
  - political context

- Basic principles of the EU regarding international treaties

- EEA EFTA states’ ideological and political constraints on integration
How well does the EEA’s institutional architecture function?

- Malfunctions regarding specific elements of policy cycle, e.g. regarding speed of incorporation
- Certain adaptability and flexibility of institutional framework
- Certain institutional innovations
- Continuous political dialogue as the basis of trust and credibility
How do the institutional arrangements contribute to the overall functioning of the EEA?

- Institutional path-dependency tends to lock in prior integration.
- Institutional framework is a necessary but not sufficient conditions for effective external differentiation.
- Country-specific factors such as administrative capacity, degree of interdependence, degree of politicisation also contribute to the functioning of the EEA’s institutional framework.
How inclusive is the institutional architecture of the EEA?

- Democratic deficit
  - Lack of accountability and congruence
  - Shadow of hierarchy
  - Lack of transparency and debate

- Democratic trap
  - Impossibility to balance input- and output-legitimacy

- But: no automatic transfer of EU policies and no hegemony
Lessons for the EEA and the EEA EFTA states

The EEA EFTA states have to ...

- ... ensure that their involvement in EU policy-making takes place at an early stage.
- ... entrust the EFTA Secretariat with a leading role in the administration of the process of the incorporation of new EU legislation.
- ... provide the administrative and political resources at the national level in order to take advantage of their decision-shaping rights.
- ... continuously raise awareness of specific features of the EEA within the EU.
- ... finally accept the constitutional implication that come with advanced economic integration.
Lessons for ‘privileged partnerships’

- An effective and inclusive model of external differentiation enabling non-EU countries to fully cope with the legislative dynamics of the EU has yet to be found.
- The search for efficient institutional arrangements gets even more difficult as integration into the EU proceeds.
- This search does not end with the agreement on an institutional set-up as additional institutional arrangements are needed for new EU acts to be incorporated into the existing agreement.
Thank you very much for your attention!

www.liechtenstein-institut.li