

On 7 April 2017, Christian Frommelt successfully defended his dissertation at ETH Zurich. The dissertation entitled «In Search of Effective Differentiated Integration: Lessons from the European Economic Area (EEA)» can be downloaded from the website of the Liechtenstein Institute. We asked Christian Frommelt a few questions.



Christian Frommelt: «No other model enables such extensive integration of non-member states as the EEA. What works for the EEA EFTA states does not have to work for other states.»

How well does the EEA work?

Interview with Christian Frommelt on his dissertation «In Search of Effective Differentiated Integration: Lessons from the European Economic Area (EEA)»

The focus of your dissertation is on the European Economic Area (EEA). Why did you focus exactly on the EEA?

The EEA Agreement has a long history. It was signed on 2 May 1992 and entered into force on 1 January 1994. Liechtenstein has been a member of the EEA since 1 May 1995. Undoubtedly, the EEA Agreement is the most important instrument for the EEA EFTA states of Iceland, Liechtenstein and Norway in shaping their relations with the European Union (EU). But the EEA plays a special role also from the perspective of the EU, as no other agreement between the EU and a non-member state ensures such a far-reaching integration with the EU. This makes the EEA interesting for states that are not willing or able to join the EU, as well as for states that are no longer willing to remain a full member of the EU. In addition, the debate on the EEA provides important insights into the debate on the future of the European integration process.

What do you mean by external differentiation?

If EU rules – such as individual treaty articles (primary law) and individual legal acts (secondary law) – are equally binding on all member states, this is referred to as uniform integra-

tion. However, this is not always the case. The territorially differentiated formal validity of EU law is therefore referred to as differentiated integration. It can be temporary or permanent.

Another distinction must be made between internal differentiation and external differentiation. While internal differentiation refers to the differentiated validity of EU law between the individual EU states, external differentiation means that certain EU rules are also binding on a non-EU state, based on a legal agreement with the EU. Differentiated integration is generally regarded as a strategy of the EU to respond to the differing integration capacity and willingness of European states, and has thus become an integral part of the European integration process. My dissertation focuses mainly on the EEA as a particularly far-reaching example of external differentiation.

In recent years, research on differentiated integration has attracted more interest. How does your work fit into this research?

The numerous opt-outs that apply to individual EU member states and the close links between certain non-member states and the EU underline the great importance of differentiated integration. So far, research has

primarily focused on internal differentiation, while external differentiation has met with little interest. However, events such as Iceland's application for EU membership (which in the meantime has been withdrawn), the negotiations between Switzerland and the EU on a framework agreement, and most recently the [proposed] withdrawal of the UK from the EU have revived research on external differentiation.

My dissertation was part of a research project on differentiated integration at the ETH Zurich, under Prof. Frank Schimmelfennig and at the University of Konstanz, under Prof. Katharina Holzinger. The goal of the project was to quantify differentiated integration at the level of primary and secondary law and to isolate the underlying mechanisms. I was able to provide the data on the EFTA states.



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With RECAP, the Liechtenstein Institute presents interviews on current topics. The interviews refer to lectures or publications by employees of the Liechtenstein Institute and provide important background information.

In view of the high number of EU rules, this seems to be a big task.

Yes, the data collection was indeed the biggest task. For each individual EU legal act, it was necessary to check whether it was EEA-relevant and, if so, whether and under what circumstances it was incorporated into the EEA Agreement.

A total of more than 50,000 EU legal acts were taken into account for the analyses. In addition to this empirical evaluation of EU law, the dissertation contains many other data from surveys or statistical publications on the EEA EFTA states. I have also conducted numerous interviews.

The term «effectiveness» plays a central role in your research. What does the term mean in this context?

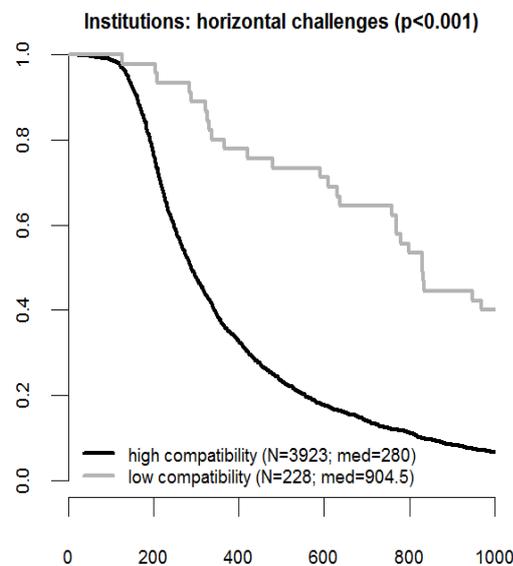
My basic research question is: Under what conditions is external differentiation effective? The aim of the EEA is to create a homogeneous and dynamic economic area. The achievement of this goal is measured by the EEA's policy cycle, which can be divided into three phases. In the first phase, the contracting parties have to filter out those EU acts relevant to the EEA from the total number of new EU acts.

In a second step, these legal acts are to be incorporated into the EEA Agreement. As a rule, this incorporation takes place by a decision of the EEA Joint Committee. The contracting parties have the possibility to include adaptations to individual EU acts in this decision. Such adaptations are particularly intended to ensure the compatibility of the EU legal act with the two-pillar structure of the EEA, as well as with the regulatory preferences and capacities of the EEA EFTA states.

The third stage of the EEA policy cycle relates to the implementation and application of the adopted EU law by the EEA EFTA states. To sum up, the homogeneity rule of the EEA requires consistent selection, prompt and complete incorporation, as well as the correct implementation and application of EEA-relevant EU law. If all this is fulfilled, the EEA is considered to be effective.

This sounds like a very comprehensive understanding of effectiveness. Does your dissertation contain any other definitions of effectiveness?

Figure 1: Time to incorporation of EU acts with specific institutional requirements compared to time to incorporation of EU acts without specific institutional requirements



Note: Period 1995–2015 (EEA JCD); 1994–2015 (EU acts); only directives and regulations. The y-axis describes the share of non-incorporated EU acts while the x-axis measures the time to incorporation in days.

The figure shows that EU acts without special institutional requirements (black line) are incorporated into the EEA Agreement much faster than EU acts with special institutional features (grey line). For example, half of the EU acts without special institutional requirements were incorporated into the EEA Agreement after 280 days, while half of the EU acts with special institutional requirements were incorporated after 904 days.

Effectiveness merely describes the relationship between an achieved state and the defined goal. Therefore, effectiveness is defined differently depending on the actor and its perspective. From the perspective of the EEA EFTA states, the EEA must guarantee the greatest possible market access with the least possible transfer of decision-making authority to the EU and EFTA institutions.

In contrast, from the EU's perspective, the EEA must ensure a transfer of rules from the EU to the EEA EFTA states without restricting the integrity of the EU's legal order or the autonomy of EU decision-making. However, the effectiveness of the EEA can also be measured by the extent to which the EEA actually creates a common liberalised market and thus a level playing field for its market participants. This list of definitions is not exhaustive.

Depending on which perspective is taken, the assessment of the functioning of the EEA varies. Consequently, it is important for me to emphasise that my dissertation offers only one possible perspective on the EEA.

Politicians mostly praise the functioning of the EEA.

Yes, that is true. The EEA is usually

rated positively by both the EU and the EEA EFTA states. One reason for the positive assessment of the EEA is certainly that throughout the history of the EEA its institutional structure has shown great flexibility in adapting to changes in EEA-relevant EU law and the associated political challenges. The adaptability of an agreement and its members to changing environmental conditions therefore offers a further understanding of effective external differentiation.

On average, the incorporation of an EU act into the EEA Agreement takes nearly twice as long as provided for in the agreement.

The EEA policy process is very complex and protracted. How can the effectiveness of the EEA be measured in concrete terms on the basis of this process and what have you been able to observe?

An example of a violation of the EEA's homogeneity is the delayed incorporation of EU law into the EEA Agreement. Instead of the 180 days provided for in the EEA Agreement, between 1994 and 2016 the incorporation of an EU act into the EEA Agreement took on average 330 days. For a number of legal acts, incorporation even took several years. Such a delay in incorporation usually leads to a difference in the binding character of EU law in the EEA EFTA and EU

states, in other words to differentiation. This means that the provisions of an EU legal act are binding only on the citizens and companies of the EU states, but not on the ones of the EEA EFTA states.

What are the consequences?

The actual consequences vary from one legal act to another. For example, a delayed incorporation may result in companies of the EEA EFTA states no longer having access to the EU’s internal market. Conversely, companies in the EEA EFTA states may be given preferential treatment because they do not have to comply with certain regulatory standards while still having full market access.

How can the delayed incorporation be explained?

To address this question, I have empirically tested a whole range of potential explanatory factors. Given the large amount of data, operationalising these factors was not always easy. However, most of the tested factors turned out to have a significant impact on the speed of incorporation. For example, I was able to demonstrate that characteristics such as the compatibility of an EU legal act with the institutional framework of the EEA or with its functional scope, as well as the general politicisation of a legal act, influence the speed of adoption. The lower the compatibility and the high-

Differentiated integration is a reaction to the different integration capacity and willingness of the European states.

er the politicisation, the greater the delay in incorporation.

The empirical analysis thus shows that the effectiveness of the EEA depends essentially on the specific characteristics of the EU legal act to be incorporated into the EEA Agreement.

What conclusions can be drawn from this?

A central conclusion is that the institutional framework of external differentiation is a necessary, but not a sufficient, condition for effective external differentiation. In other words, just because the contracting parties have agreed on concrete institutions and processes does not at all mean that the effectiveness of external differentiation is secured in the long term.

In a dynamic integration regime such as the EEA, ensuring homogeneity is a permanent task. In this context, I also refer to the specific characteristics of the EEA EFTA states, which as prosperous and stable democracies have a high administrative capacity, but which due to their small size and high dependency on access to the EU market have only weak negotiating power vis-à-vis the EU. From the point of view of compliance research, the EEA EFTA states therefore offer ideal conditions for fulfilling international obligations. I therefore

argue that the functioning of the EEA depends not only on its institutional structure and the characteristics of the EU law to be adopted, but also on the characteristics of the EEA EFTA states. In other words, what works for the EEA EFTA states does not have to work for other states.

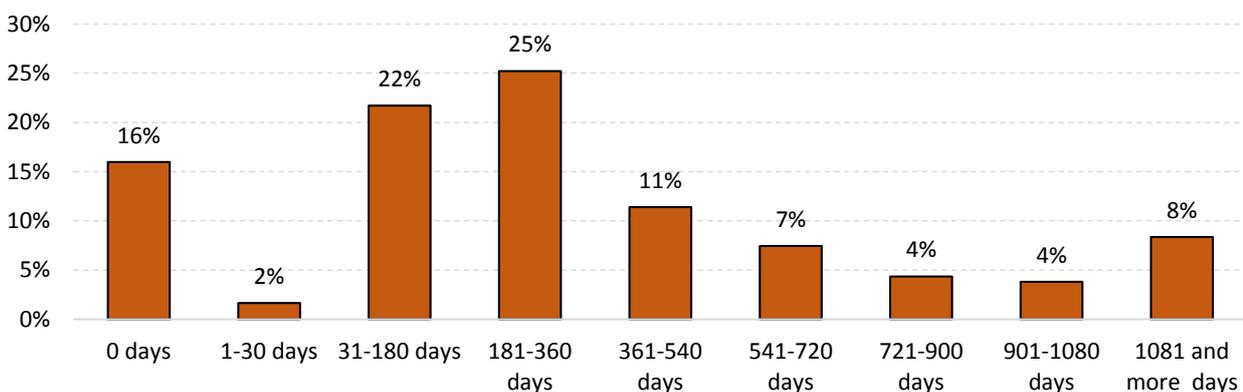
What other aspects of the EEA have you examined?

In addition to the speed of adoption, I have also examined the consistency of EU and EEA law in the different policy areas covered by the EEA. To this end, I compared, inter alia, the directives and regulations incorporated into the EEA Agreement with the directives and regulations in force in the EU as a whole as of 31 December 2015. The empirical study shows that the degree of correspondence of EU

The ongoing dialogue between the EEA EFTA states and the EU at both administrative and political level provides the basis for trust and credibility.

and EEA law strongly varies across the different policy areas of the EEA and often only around two-thirds of the EU law in force in a specific policy area were actually incorporated into the EEA Agreement. I was surprised by this result, as I would have assumed, given the objectives of the EEA, that certain areas are fully integrated and others are not integrated at all. The conclusion to be drawn from this is that the scope of external differentiation cannot be clearly defined and

Figure 2: Share of EU acts with different compliance dates in the EU and the EEA EFTA states (N=4573; 1994–2015)



The figure shows that only 16 per cent of the EU acts incorporated into the EEA Agreement had the same compliance date in the EU and the EEA. For all other legal acts, the application in the EEA EFTA states was delayed. As a result, the rights and obligations associated with a legal act were binding only on the EU states but not on the EEA EFTA states.

Note: Only directives and regulations; only first compliance date.

therefore that the relevance of new EU law for a model of external differentiation will continue to be questioned.

This means that not all legal acts of an EEA-relevant policy field are actually incorporated into the EEA Agreement. Does this not violate homogeneity?

Yes, in many policy areas not all legal acts with an EEA-relevant legal basis are actually incorporated into the EEA Agreement. This does not automatically mean, however, that homogeneity is infringed. A legal act that can be assigned to an EEA-relevant policy area does not necessarily have to be EEA-relevant. Even within an EEA-relevant policy area, many legal acts primarily govern internal EU issues and therefore do not have to be incorporated into the EEA Agreement. The extent to which a violation of homogeneity actually exists would have to be examined individually for each case, which was not possible in view of the large amount of data. There are, however, legal acts which have not been incorporated into the EEA Agreement, although such an incorporation should have taken place in order to ensure the homogeneity and scope of the EEA.

In addition to the diffuse scope, you also refer to changes in the two-pillar structure of the EEA.

Exactly. The basic concept of the institutional structure of the EEA Agreement has not changed since its entry into force. Generally speaking, it is still the EFTA Surveillance Authority (ESA) and the EFTA Court that monitor the implementation and interpretation of EEA law in the EEA EFTA states and thus fulfil similar tasks to the European Commission and the EU Courts. Furthermore, it also remains true that the EEA EFTA states cannot transfer legislative sovereignty – in the sense of a substantial, binding decision-making competence – to EU institutions, since such a transfer of competence would first require an amendment to the Norwegian and Icelandic constitutions. Within the material scope of application of the EEA, however, vari-

The EEA has ensured that the EU and the EEA EFTA states have not grown further apart, despite the progressive dynamics of the European integration process.

ous agencies and other decentralised bodies have meanwhile been created in the EU which can take binding decisions vis-à-vis the member states.

The principle of homogeneity obliges the EEA EFTA states to incorporate these EU institutions – with all the powers they have been accorded – into the EEA Agreement. However, this transfer is often very difficult because a specific solution has to be found for each institution that is compatible with the political and constitutional principles of the EEA EFTA states and with the two-pillar structure of the EEA. Moreover, the agreed solution must preserve the autonomy of EU decision-making and the integrity of EU law and must of course also be effective in the sense that the EU institution is able to fulfil

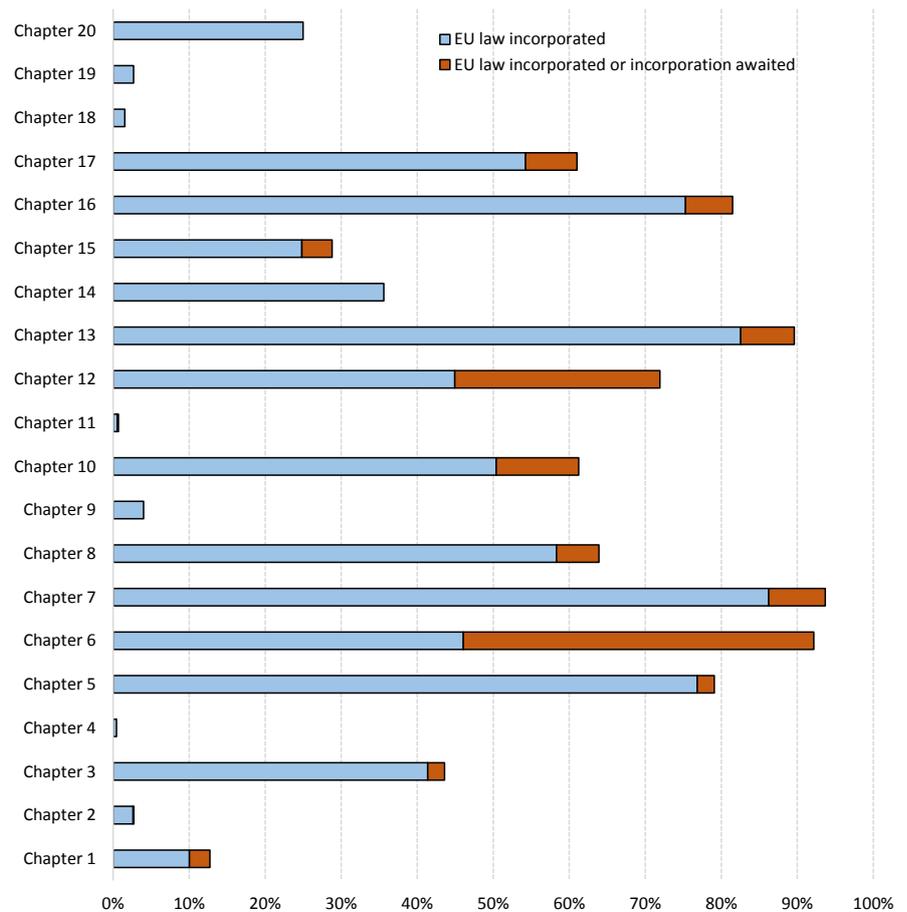
its regulatory tasks.

This sounds like a major challenge. Can sustainable solutions be found for this at all?

So far, after often long negotiations, a solution to the satisfaction of the EU and the EEA EFTA states has always been found. Especially in Norway and Iceland, however, the agreed solutions are often criticised as merely token solutions that do not solve the basic dilemma in the long term. In most cases I share this criticism. The result is that in recent years various decision-making rules have been added to the two-pillar structure of the EEA that only apply in specific cases.

Irrespective of whether these rules are actually compatible with the basic principles of the EEA and the preferences of the EEA EFTA states, they have further increased the complexity of the EEA. Moreover, they make it practically impossible

Figure 3: Comparison of consolidated EU and EEA law (31 December 2015)



The figure shows the degree of correspondence of EU law in force on 31 December 2015 with EEA law in force on that day. The classification by chapter is based on the Directory of EU law (see eur-lex.europa.eu). For example, the figure shows that in Chapter 3, i.e. the chapter on agriculture, 41.4 percent of the EU legal acts in force in the EU have also been incorporated into the EEA Agreement.

Note: Only directives and regulations; only consolidated legal acts.

to clearly define the EEA as either intergovernmental or supranational. Consequently, it is also impossible to correctly classify the effects of the EEA on national sovereignty and democracy.

According to your analyses, the functional scope of the EEA is diffuse and its institutional structure highly complex and partly inconsistent. This gives a very critical picture of the EEA.

I have already said that this is only one perspective on the EEA. I do not want to criticise the EEA too much. For me, there is no question that the EEA has been a success for all the EEA EFTA states and that it plays an important role in the European integration process. In the case of Liechtenstein, where EU membership would pose a great challenge due to its smallness, I even consider the EEA to be almost without an alternative. However, this does not mean that we can overlook its weaknesses. Measures such as the introduction of the fast-track procedure in 2014 show that there are certainly ways of improving the functioning of the EEA. A critical view of the EEA should also free us from the illusion that external differentiation offers a simple, inclusive and efficient alternative to full EU membership.

One criticism often voiced against the EEA is its democratic deficit. Did you analyse this in your dissertation?

Indeed, the EEA is often criticised for its democratic deficit, which is manifested in its limited access to EU policy-making, in particular the lack of voting rights of the EEA EFTA states in the EU's legislative process. Metaphorically speaking, there is no congruence between the decision-makers and those affected by their decisions, and thus no accountability. This democratic deficit is obvious. However, in my work, the traditional criticism of the democratic deficit of the EEA has to be qualified to some extent due to the often delayed incorporation and the numerous EEA-specific adjustments, which mean that the incorporation of EU law into the EEA Agreement is not an automatic process. This is also a consequence of the relationship between the EU and the EEA EFTA states being less hierarchical than we might assume, given

the EU's superior bargaining power. In my view, this is due to the fact that the fundamental concept of the EU is directed towards compromise and consensus instead of hard-bargaining. In addition, the sanctions provided for in Article 102 of the EEA Agreement, which are of course much more threatening for the EEA EFTA states in the event of an infringement of homogeneity, are not clearly specified and difficult to use. Finally, empirical analysis shows that the actual level of integration of the EEA EFTA states is lower than is often assumed. If one looks only at legislative integration – and ignores the Europeanisation that goes beyond it – there is still a great difference between EU and EEA membership. Of course, these points do not resolve the issue of the EEA's democratic deficit, but they put it into perspective.

In your dissertation you speak of a democracy trap. What does that mean?

In the EEA it is virtually impossible to achieve a balance between input and output legitimacy. By input legitimacy I mean the involvement of domestic actors such as parliaments, political parties and associations in the decision-making process, while output legitimacy is measured by the objectives of the EEA and thus the creation of a homogeneous and dynamic economic area. As soon as the EEA EFTA states involve domestic actors to a greater extent in the process of incorporation, the risk of delays and EEA-specific adaptations increases and the homogeneity of EU and EEA law is reduced. As a result, the goal of the EEA in terms of a homogenous economic area with a level playing field is no longer guaranteed. Furthermore, I criticise the limited transparency and high level of inconsistency in the EEA.

Let us return to the starting point. The EEA is regarded as a benchmark for external differentiation. What conclusions do your analyses provide for the research on external differentiation?

I published the first parts of my empirical analyses several years ago. They had a major impact on the debate between the EU and the EEA EFTA states on the «backlog» - the delayed adoption of EU law into the EEA Agreement. Regarding the research on external differentiation, the dissertation offers a detailed description and analysis of the processes and institutions of the EEA. Various particularities of the EEA EFTA states and the domestic effects of their European policy are also examined.

In the last part of the dissertation, you also introduce a new typology and logic of external differentiation.

Exactly. This has to do with the fact that external differentiation has so far only been considered at the level of agreements between the EU and a non-member state, whereas the EU law adopted by these agreements has not been examined. Therefore, I distinguish between «first-order differentiation» and «second-order differentiation». The former describes the step from non-integration to selective integration by explicitly referring to parts of EU law. In this vein

The EEA is a success for all EEA EFTA states and plays an important role in the European integration process. The critical view of the EEA, however, should free us from the illusion that external differentiation offers a simple, inclusive and efficient alternative to EU membership.

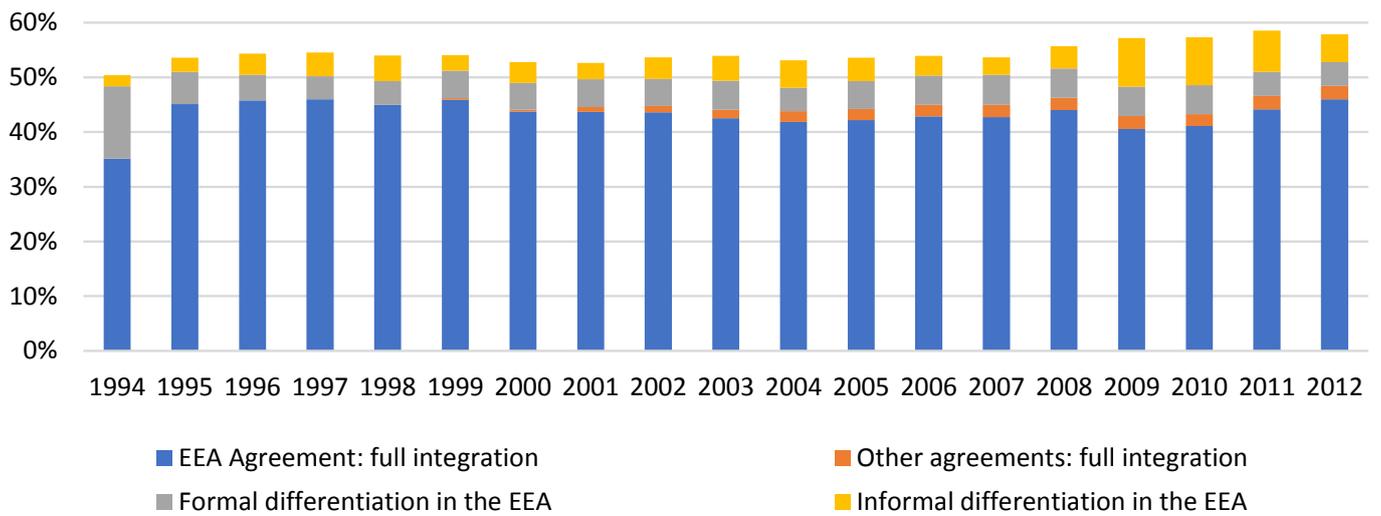
it defines the scope of an agreement between the EU and a non-member state. However, as mentioned above, there are various exceptions within the EEA's functional scope that apply either to all or only individual EEA EFTA states. These specific exceptions within the scope of the EEA Agreement I call «second-order differentiation».

If we want to compare the level of integration of the EU and EEA EFTA states, it is important to consider these exceptions as well. For example, the empirical analysis shows that more than 40 percent of the EU legal acts incorporated into the EEA Agreement do not apply to Liechtenstein.

How can the many exceptions for Liechtenstein be explained? And what is the situation in the other EEA EFTA states?

The exceptions for Liechtenstein are primarily related to its small size and

Figure 4: Extent of integration of the EEA EFTA states



The figure shows the share of legally binding EU acts for the EEA EFTA states at the end of the year. For instance, on 31 December 2012, 46 per cent of the EU acts in force were also in force in the EEA EFTA states based on the EEA Agreement. 2.3 percent of the EU acts applied in force in the EEA EFTA states were based on agreements other than the EEA Agreement (e.g. Schengen). In 4.3 percent of the legal acts, at least one EEA EFTA state had an exception. Finally, 5.1 percent of the EU acts were not yet incorporated into the EEA Agreement due to a delayed incorporation.

Note: Only directives and regulations adopted by the Council as well as the Council and the Parliament; only consolidated legal acts.

the close relations between Liechtenstein and Switzerland. However, when interpreting Liechtenstein’s high number of opt-outs, we have to consider that parts of the suspended EEA law apply in Liechtenstein via the sectoral agreements between Switzerland and the EU. Either way, Liechtenstein’s exceptions aim less at preserving sovereignty or material preferences – as is usually the case with exceptions for EU states – than at taking the pressure off Liechtenstein’s limited administrative resources. Norway and Iceland also have some opt-outs. However, in most cases in which Norway has requested and been granted an exception, an analogous exception had already been granted to at least one EU state. Thus, the homogeneity of the EEA remains unaffected by such derogations.

According to you, the EEA-specific exceptions are based on three mechanisms: constitutional logic, instrumental logic, process-based logic. What do you mean by that?

The three logics mentioned are intended to explain when opt-outs are requested by the EEA EFTA states and whether they are actually implemented. In doing so, I refer to existing concepts in the research on differentiated integration. The cons-

titutional logic comes into play in the case of exceptions that apply to all EEA EFTA states and takes account of the institutional structure and scope of the EEA. The constitutional differentiation continues to reflect the political reservations of the EEA EFTA states about supranational integration, which led to the EEA EFTA states continuing to remain outside the EU. The instrumental differentiation refers to specific exceptions for an individual EEA EFTA state. Thus, both different material and ideological preferences and different resources and capacities can trigger differentiation within the EEA.

These types of differentiation do not differ from differentiation in the EU, only that more such exceptions were granted in the EEA than in the EU.

And process-based logic?

This is a specific logic for dynamic regimes of external differentiation. According to this logic, differentiation is not actively demanded, but arises from the incorporation of EU law into the EEA agreement. It is not based on heterogeneous preferences between the EU and the EEA EFTA states but on the complexity and inconsistency of the EEA’s institutional architecture. The process-based logic of differentiation is central to the

understanding of the EEA. As I have already said, delayed incorporation can lead to a differentiated validity of EU law in the EEA EFTA and EU states. Indeed, the empirical analysis shows that less than 20 per cent of the acts incorporated into the EEA Agreement since 1994 had the same date of application in the EU and the EEA. In all other cases, the EU states were obliged to convert and implement these acts into national law before the EEA EFTA states.

As mentioned above, I have identified several factors that explain the delayed incorporation. In view of the complexity of the EEA Agreement, however, such a delay is inherent in the system. This is what I seek to explain by the logic of process-based differentiation.

The argument of the institutional complexity of the EEA can be found in various parts of your dissertation. Could we not simply reform the EEA Agreement here?

There are clearly possibilities to reduce the institutional complexity of the EEA and make its processes more efficient. In my opinion, the EFTA Secretariat has a key role to play here, as it has the necessary expertise and resources to carry out a coordination function, which is very important in such a complex struc-

ture with diverse actors. However, the EEA EFTA states would also have to give the EFTA Secretariat the necessary authority to do this. It is also very important for the EEA EFTA states to actively participate in the EU decision-making process - even if their possibilities are limited. In this way, important information can be generated at an early stage that later on may facilitate the incorporation of new policies into the EEA Agreement. Ultimately, however, in order to increase the effectiveness of the EEA, the EEA EFTA states would have to work at their domestic level to improve the basis for their participation in the European process of integration by providing more resources, ensuring greater transparency and, in the case of Norway and Iceland, adapting their Constitutions to facilitate a transfer of decision-making power to supranational institutions.

But you do not see a major reform of the EEA Agreement?

No. I do not consider such a reform to be realistic at the moment. Among other things, an agreement between the EU and a non-member state has to govern its access to the EU decision-making process, the continuous exchange of information between the contracting parties, the adoption, monitoring and enforcement of the relevant provisions and, finally, the settlement of disputes between the contracting parties. How all of this is structured depends on the extent of integration and on the specific characteristics of the integrated policy areas.

In the case of the EEA, the scope is very broad and the integrated policy areas so diverse that, as a result, a complex structure cannot be avoided. A reform of the EEA is also countered by the fact that neither the EU nor the EEA EFTA states have changed the basic principles of their integration policy since the EEA Agreement was concluded. The EEA EFTA states are therefore still not ready for comprehensive integration that would allow for a transfer of decision-making authority to EU institutions. Conversely, the EU continues to insist on the autonomy of its decision-making process and the integrity of EU law, which means simply that the final de-

cision on the interpretation of EU law is taken by the EU institutions.

Let us now summarise: How do you think the EEA has affected the European integration project?

My assessment is ambivalent. External differentiation leads to more integration and more Europeanisation, since states that do not want to join the EU nonetheless enter into a very close relationship with the EU and apply EU law. One can also observe

A major reform of the EEA Agreement is not realistic.

an institutional and functional spillover effect, whereby the institutional competencies and the functional scope of the EEA have been repeatedly expanded over time. The negative assessment points to the high complexity of external differentiation and the more and more purely symbolic adherence to the idea of intergovernmental cooperation.

Furthermore, the risk of different legal standards and thus the danger of discrimination and legal uncertainty is inherent in dynamic models of external differentiation. For this reason, I do not currently see an efficient and inclusive model of external differentiation. However, I would also like to highlight two advantages of the EEA: although the main part of the EEA Agreement has never been revised substantially since 1992, there have been some institutional innovations to accommodate changes in the EU.

In addition, the EEA ensures an ongoing dialogue between the EEA EFTA states and the EU, at both administrative and political levels. This dialogue creates trust and credibility. The path dependency has so far been too strong for this dialogue to have triggered a substantial step towards more integration. However, it has at least ensured that the EU and the EEA EFTA states did not grow further apart from each other despite the progressive dynamics of the European integration process.

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