Déjà-vu? Institutional features of a possible future EU-UK partnership

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The withdrawal of the United Kingdom (UK) from the European Union (EU) has put the question of alternative forms of privileged relations with the EU back on the political agenda. Although Brexit is a unique case of disintegration, the negotiations between the UK and the EU on a new, bespoke relationship will be far from unique. Brexit is taking place as other neighbouring countries – beyond the candidates for EU membership – seek to develop their relations with the EU and secure further, smoother access to the internal market. Examples include the EU-Swiss draft institutional framework agreement, the EU's forthcoming association arrangements with the small-sized states of Andorra, Monaco and San Marino (AMS), and a possible - although for political reasons pending - modernization of the EU-Turkey customs union. As the first and so far most far-reaching internal market-based association agreement, the multilateral European Economic Area (EEA) continues to play a special role as the 'benchmark model' for these evolving privileged partnerships. Any future partnership agreement between the UK and the EU will thus be heavily path-dependent.

The new book The Proliferation of Privileged Partnerships between the European Union and its Neighbours, edited by Sieglinde Gstöhl and David Phinnemore (Routledge, 2019), provides in-depth analyses of the various privileged partnerships.

Principles and institutional questions

There has been limited institutional innovation: the so-called 'Interlaken principles' of 1987, developed with a view to the EU's evolving relations with the countries of the European Free Trade Association (EFTA), still hold three decades later. In developing its external relations, the EU has always sought to preserve the autonomy of its decision-making and striven for a balance of benefits and obligations. In its Opinion 1/91 on the EEA Agreement, the Court of Justice of the EU (CJEU) explicitly added the preservation of the autonomy of the EU legal order.

Most privileged partnerships with the EU take the form of association agreements. These involve 'reciprocal rights and obligations, common action and special procedure' (Article 217 TFEU) with the EU in practice insisting to varying degrees on maintaining the homogeneity of its (partly) shared internal market and ensuring legal certainty for citizens and business. Since the creation of the EEA, and notably in the past decade, the EU has repeatedly made clear that a range of institutional issues need to be addressed in relations with its close neighbours: (1) how to keep agreements up-to-date in light of relevant new EU law; (2) how to monitor partners' compliance; (3) how to ensure the uniform interpretation of agreements in line with the EU law from which they are derived; and (4) how to settle disputes between the parties.

Keeping agreements up-to-date

When it comes to decision-making, the EEA is based on a dynamic procedure where the EEA EFTA states participate in 'decision-shaping' and have the right to raise a matter of concern at the EEA level at any time. The current Swiss approach, by contrast, is mainly static, based on equivalence of laws, although there are a few exceptions. Swiss involvement in decision-shaping is limited to the Schengen/Dublin arrangements and a customs security agreement. The draft institutional framework agreement of November 2018 would apply to five of the current market access agreements and certain future agreements. It envisages a 'decision-shaping' role for Switzerland with regard to the incorporation of new EU acquis into existing agreements. The European Commission would thus consult Swiss experts as it consults experts from the EU member states or the EEA EFTA states in drafting legislative proposals; and an exchange of views could take place within the Joint Committee established in the relevant Bilateral Agreement. The Commission also informally seeks the opinion of Turkish experts on new legislative proposals of relevance for the customs union. The Association Council has a rather limited 'decision-shaping' role, but Turkey is in any case required to accept new EU legal acts as part of the accession process.

In the case of the AMS states, decision-making regarding new acquis is currently quasi-automatic – for Andorra and San Marino the respective Joint Committee decides, while Monaco uses the customs code as applied in France, and in 2003 Monaco had signed an agreement with the EU on the application of certain EU acts on its territory that require no further legislative or administrative intervention. The association agreement under negotiation since 2015 is likely to consist of a single 'framework agreement' laying down the key principles and bilateral 'country protocols' for the three small states. The dynamic take-over of the relevant EU acquis will likely follow the EEA model of constant adaptation of technical annexes and participation in 'decision-shaping'.

Monitoring the implementation of agreements

Regarding surveillance, responsibility typically lies with the Association Council or Joint Committee. The exceptions are the EFTA Surveillance Authority in the case of the EEA and the European Commission for the EU-Switzerland civil aviation agreement and for the EU's monetary conventions

with the AMS states. In the future EU-AMS association agreement, monitoring responsibilities will be largely taken over by the European Commission, given the asymmetric power relations and the precedent of the EU-AMS monetary agreements. By contrast, Switzerland and the EU were unable to reach an agreement on surveillance, and the draft institutional framework agreement does not provide for the establishment of any common supervisory body.

Legal interpretation of EU-based rules

Only the EEA EFTA pillar has its own court, whereas the other privileged partnerships rely on diplomacy in the Association Council or Joint Committees. The CJEU and the EFTA Court are in constant judicial dialogue about the interpretation of EEA law. The AMS states' monetary agreements foresee a role for the CJEU – a model that could be extended to their entire new association relationship, as does the EU-Switzerland civil aviation agreement for decisions of the EU institutions. All partners are expected to interpret the incorporated (pre-signature) acquis in accordance with EU case law and in some partnerships even relevant future (post-signature) case law. In Switzerland's draft institutional framework agreement, uniformity of interpretation based on the CJEU's case law would be the norm, irrespective of whether acts were adopted prior to or following the signature of the relevant agreement.

Dispute settlement between the parties

For dispute settlement, the initial stage is in all cases bilateral diplomacy in the Association Council or Joint Committee. Should this not resolve the matter, some agreements provide for reference to the CJEU or to arbitration. The EEA's two-pillar model foresees that if a dispute is not solved in the Joint EEA Committee, the parties may agree, where substantively identical provisions are concerned, to refer the dispute to the CJEU (which has not yet happened). Otherwise, each party may adopt proportionate rebalancing measures which may be reviewed by arbitration. The Ankara Agreement stipulates that the Association Council – which meets once a year – is responsible for dispute settlement, but it can also decide to refer matters to the CJEU or indeed another court. The latter two options have not been used as both Turkey and the EU would have to agree, and from today's perspective, an interpretation by a court other than the CJEU would hardly be possible anymore.

By contrast, the current EU-Andorra and EU-San Marino customs agreements do not require reference to the CJEU in case of identical provisions but foresee the establishment of a panel of three arbitrators to settle disputes by majority vote. Again, this has not yet happened. In the future EU-AMS association agreement, the CJEU is expected to play an important role. By contrast, disputes concerning Switzerland's bilateral agreements with the EU have to be settled diplomatically in the Joint Committees. The draft institutional framework agreement foresees that if the Joint Committee cannot find an acceptable solution within three months, either party may request that the dispute be referred to an arbitration panel, composed of members appointed in equal numbers by Switzerland and the EU. Regarding EU law incorporated in the agreements, the arbitration panel would need to request from the CJEU a binding ruling - as is the case in the Deep and Comprehensive Free Trade

Agreements (DCFTAs) between the EU and some of the Eastern Partnership countries. If either party does not or not properly implement the decision, the other party may take proportionate compensatory measures. Similar procedures exist in other EU agreements, but in those cases, the contracting parties (e.g. the EEA EFTA states) or the Association Council (e.g. in the Ankara Agreement) have the possibility (but not obligation) to ask the CJEU for a preliminary ruling.

Future EU-UK partnership: how much path dependence?

The nature and substance of the UK's post-Brexit relationship is still very much to be determined with uncertainty reigning over whether the UK government will pursue the type of ambitious economic partnership envisaged in the Political Declaration adopted in November 2018 or something more in line with Canada's Comprehensive Economic Trade Agreement (CETA). Should a post-Brexit agreement be based on the former and involve 'an ambitious, wide-ranging and balanced economic partnership' with 'ambitious customs arrangements' and 'ambitious, comprehensive and balanced arrangements' regarding services, then, given the evident path dependency in the governance of the EU's external relations, it can be anticipated that the EU will be insisting on institutional arrangements similar to those in existing and planned future privileged arrangements. The EU has already reiterated, as set out in its negotiation guidelines, that any agreement with the United Kingdom will have to be based on 'a balance of rights and obligations' and 'ensure a level playing field'. It has also repeatedly stated that it decision-making autonomy must be preserved. Whether this will all be the case remains to be seen. The UK will argue for exceptional treatment and eschew inclusion in or adoption of existing models. Successive governments have already rejected joining the EEA or a customs union. There can be little doubt too that the UK will resist any jurisdiction for the Court of Justice, as public statements and the wrangling over the dispute-settlement and arbitration arrangements in the Withdrawal Agreement already testify. All the same, the EU appears committed to – or bound by – established practices and precedent. The outcome of the negotiations on the post-Brexit UK-EU relationship has the potential to be an intriguing and important case study of the EU's path dependency.

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