

The institutions of the EEA: benchmark or soon superfluous?

Blog | 28 August 2019

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On which institutions should relations between the EU and a non-member state be based? This question is currently attracting a lot of attention. With the EEA, a model for a privileged partnership does already exist but is it still contemporary?

Institutions of the EEA

The European Economic Area (EEA) is the most comprehensive association agreement ever concluded by the European Union (EU) with third countries. The EEA Agreement is intended to create a dynamic and homogeneous economic area between the three members of the European Free Trade Association (EFTA), Iceland, Liechtenstein and Norway, and the EU states. In order to guarantee this high degree of integration, the contracting parties have agreed on the so-called two-pillar structure in laborious negotiations. This consists of an EU pillar and an EFTA pillar as well as joint bodies.

The two-pillar structure presupposes that internal EFTA matters are also dealt with within the EFTA pillar. It also ensures a formal and informal exchange between the EU and the EEA EFTA states. As a result, the two-pillar structure is both divisive and unifying. This two-fold approach reflects the central challenge of external differentiation: on the one hand, both sides want to give up as little of their autonomy as possible and thus decide separately; on the other hand, they want to cooperate as closely as possible and therefore need common rules.

Purpose and task of the two-pillar structure

During the negotiations on the EEA Agreement, the search for an institutional framework proved to be one of the greatest challenges. The EFTA states wanted to avoid any political integration that would bundle national sovereignty - e.g. in the form of qualified majority decisions - in a joint institution. At the same time, they sought to have a say in EU decision-making on EEA relevant policies

and rules. In contrast, the EU endeavoured to prevent the EFTA states from "free-riding" and "cherry-picking" by participating only selectively in the internal market. The EU also believes that the autonomy of its institutions and processes as well as the integrity of the EU legal order should be preserved. As a result, this meant that the EEA EFTA states were not granted the right to vote in the EU decision-making process and that an EU institution, the Court of Justice of the European Union (CJEU), was to act as the final arbitrator for the interpretation of EEA relevant EU law.

The two-pillar structure of the EEA is intended to ensure the homogeneity of EU and EEA law. The relevance of the two-pillar structure extends over the entire policy cycle. This means that the institutions of the EEA should guarantee consistent selection, timely and complete incorporation and correct implementation, application and interpretation of EEA relevant EU law by the EEA EFTA states. Decision shaping, i. e. the participation of EEA EFTA states and EFTA institutions in the decision-making process of the EU, is also closely linked to the logic of the two-pillar structure. This enables the actors and institutions of the EFTA pillar to participate in the development of new EEA relevant EU law and to receive important information at an early stage for the timely incorporation and correct implementation of EU law in the EEA EFTA states.

Does the two-pillar structure have a future?

Much has changed since the EEA Agreement was signed in Porto in April 1992: While the EFTA pillar of the EEA Agreement now has only three states instead of the original seven, the EU has grown from 12 to 28. The EU has also gone through various treaty revisions, while the main EEA Agreement has never been adapted. Finally, various EU legal acts have been incorporated into the EEA Agreement, containing specific institutional provisions.

All these changes did not affect the basic structure and central principles of the EEA's institutional framework. It is true that in the course of the incorporation of certain legal acts the competences within the two-pillar structure were reorganised. However, no new institutions have been created and the principle that internal EFTA matters are governed within the EFTA pillar continues to apply to almost all areas.

Furthermore, the EEA EFTA states have succeeded in eliminating efficiency deficits in the incorporation of EU law into the EEA Agreement with some innovations, such as the introduction of the fast-track procedure. Another positive aspect is the constantly improving exchange between the EFTA and EU pillar, in particular between the EFTA Surveillance Authority (ESA) and the European Commission as well as between the EFTA Court and the CJEU. Another welcome development is the intensified communication measures on the EEA and its institutions.

Yes, but ...

So why should not the two-pillar structure continue to exist for another 25 years? If it were only about the EU and the EEA EFTA states, there would probably not be much to say against it. But the

future of the two-pillar structure of the EEA is also determined by the ongoing negotiations between the United Kingdom and the EU, Switzerland and the EU or the EU and the European micro-states Andorra, Monaco and San Marino. There is the same question everywhere: How can an institutional framework be created that allows efficient management of common relations and protects the integrity of relevant EU law despite the reservations of those countries about any kind of political integration? Moreover, the experiences of the EEA show that due to the dynamic development of EU law discussions on institutional issues continue despite such an institutional framework was agreed. As a result, I argue that the institutional framework is a necessary but not a sufficient condition for the proper functioning of external differentiation.

It cannot be assumed that the institutional arrangements negotiated between the EU and the United Kingdom, Switzerland or the European micro-states will function much better than the two-pillar structure of the EEA. On the contrary, serious functional deficits can be expected until the institutions created between the EU and these states have built up the necessary know-how and capacities, and until the current politicisation of these states' relations with the EU has transformed itself into a constructive political dialogue. In this regard, those institutional arrangements may even improve the position of the EEA's institutional framework as the benchmark for a privileged partnership between the EU and European non-member states.

On the other hand, some political actors in the EEA EFTA states may perceive the institutional agreement between Switzerland and the EU or similar institutional arrangements with other non-member states that allow for a partial membership in the EU internal market without an independent surveillance mechanism as a preferential treatment of those states compared to the EEA EFTA states. Indeed, based on the experience of the EEA EFTA states, it is difficult to understand how a membership of a third country in the EU internal market can function to the satisfaction of the EU and can guarantee legal certainty without an independent supervision. Hence, in the medium-term discussions on the appropriateness of the existing institutional framework of the EEA cannot be excluded.

The further development of the institutional agreement between Switzerland and the EU is therefore also of particular interest to the EEA EFTA states and could sooner or later lead to a departure from the current two-pillar structure. The question of whether this is actually in the interest of the EEA EFTA states and the EU will be addressed in a separate contribution.

Citation

Frommelt, Christian (2019): The institutions of the EEA: benchmark or soon superfluous? Blog. efta-studies.org.

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