

Brexit and the future of the EEA

While much has been written about the European Economic Area (EEA) as a potential model for the United Kingdom (UK) after its withdrawal from the European Union (EU), the question of how Brexit will affect the European politics of Iceland, Liechtenstein and Norway as members of the European Free Trade Association (EFTA) and the EEA has rarely been debated.

The EEA EFTA States appear to be prepared for Brexit. In December 2018, an agreement with the UK was presented which deals with the EEA relevant parts of the withdrawal agreement between the UK and the EU. In this way, an orderly exit of the UK from the EEA shall be ensured. In February 2019, Iceland, Liechtenstein and Norway also concluded a joint agreement with the UK to safeguard citizens' rights in the event of a No Deal Brexit. In addition, all three EEA EFTA States bilaterally agreed with the UK to maintain free movement of goods in the event of a No Deal Brexit. Finally, each EEA EFTA State has established national contingency plans to prepare their businesses for Brexit.

These time-consuming preparations have focused on the immediate effects of Brexit. However, Brexit can also be seen as a "critical juncture" that shapes the future path of the EEA and its institutions. The following three statements shall reflect possible effects of Brexit on the EEA. First, however, I briefly describe the main pattern of differentiated integration in the EEA.

Differentiated integration in the EEA

Differentiated integration allows states to cooperate at different levels of integration based on their preferences and capabilities. The relations of the EEA EFTA States with the EU are determined by economic incentives for integration, which, however, are opposed by ideological reservations about political integration. As a result, the functional scope of the EEA consists mainly of highly interdependent but weakly politicised policy areas.

Nevertheless, in the negotiations on the EEA Agreement, the EEA EFTA States were unable to get through many of their original preferences. This shows that the demand for differentiation can only be realised if such differentiation is actually offered. In the case of the EEA negotiations, the supply of differentiated integration was limited by the EU's institutionalized norms that are often described as the Interlaken principles. These three principles are: i) Community integration comes first, ii) Community's decision-making autonomy must be preserved, and iii) there has to be a balance between benefits and rights.

As a result of the Interlaken principles we have to distinguish two main strands of EEA work: First, there is the EU policy shaping, which is influencing EEA relevant EU legislation before it is adopted by the EU and second, EEA decision-taking, which is the incorporation of an adopted EEA relevant EU act into the EEA Agreement. The main challenge of the EEA decision-taking is the conflict between the requirement of a timely and complete incorporation and the need to take into consideration the specific institutional features of the EEA as well as the EEA EFTA States' regulatory preferences and capabilities. While the former should ensure the EEA's homogeneity, the latter should preserve the EEA EFTA States' legislative autonomy.

Statement 1:

The EEA EFTA States should not have an interest in the UK joining the EEA.

Due to its elaborated institutional framework the EEA is often seen as the benchmark for external differentiated integration. However, this institutional framework is highly complex bearing the risk of being opaque and inefficient if the contracting parties do not cooperate to the fullest possible extent. Moreover, institutions are a necessary but not a sufficient condition for effective external differentiated integration. The functioning of the

EEA is therefore not only the result of its institutional framework but so are the characteristics of its members, in particular the rather limited bargaining power of the EEA EFTA States, their high administrative capacity and their strong political commitment to the EEA. To put it differently, an EEA membership of the UK could only work if the UK would be able to replicate the political conditions that have enabled the EEA to work in the EEA EFTA States. Considering the UK's economic and political relevance as well as the high polarisation of its people with regard to European integration this is highly unlikely to be the case. An EEA membership of the UK would make the administration of the EEA more challenging and a level playing field for businesses in the EU and the EEA EFTA States less likely. The EEA EFTA States can therefore not have an interest in the UK joining the EEA.

Statement 2:

Brexit will trigger a competition about different models of external differentiated integration.

Thus far, EEA membership has caused surprisingly little controversy in the EEA EFTA States. 25 years after the entry into force of the EEA Agreement there is much to suggest continuity. However, if the UK and the EU agree on a sustainable model for their future relations, some parties in the EEA EFTA States could see such a model as an alternative to EEA membership, regardless of whether it would actually bring new benefits for the EEA EFTA States. The institutional agreement currently being negotiated between Switzerland and the EU is another example of a model that may be seen as an alternative to the EEA Agreement – especially as the draft agreement does not contain a surveillance mechanism comparable to the institutional arrangement of the EEA. As new models may soon be on the table, the EEA is no longer considered to have no alternatives. This can suddenly increase the debate on the advantages and disadvantages of EEA membership in the EEA EFTA States. It will become apparent how such competition between the different models for external differentiated integration affects the daily administration of the EEA. Due to the EEA's highly complex institutional framework, increased politicisation is likely to decrease the EEA's efficiency. Moreover, it may undermine the authority of the EEA EFTA institutions such as the EFTA Surveillance Authority (ESA) and the EFTA Court. The current political chaos around Brexit mainly serves the supporters of the EEA. However, depending on the outcome of the negotiations this may change rapidly and the benefits of the EEA could soon be questioned by some actors in the EEA EFTA States as well.

Statement 3:

Brexit will increase the politicisation of external differentiated integration in the EU.

By ratifying the EEA Agreement, the EEA EFTA States have committed themselves to the objective of a homogeneous and dynamic economic area. Nevertheless, they continue to try to avoid any form of political integration that would trigger a transfer of power from the nation state to the European level. Over the last 25 years, the EU has repeatedly insisted on its conditions for incorporating new EEA relevant EU legislation into the EEA Agreement. However, the EU had also accepted various EEA-specific adaptations and was unable to prevent the much-delayed incorporation of various EU acts. Overall, we can argue that the supply for differentiated integration is significantly higher in the EEA EFTA pillar than in the EU pillar. At the institutional level, too, the functioning of the EEA is determined more by pragmatism than by consistency. In their desire to guarantee the functioning of the EEA, all parties repeatedly showed a willingness to compromise. By contrast, in the Brexit negotiations, the EU surprised with unity. The EU has repeatedly highlighted its basic principles for external differentiated integration, in particular the integrity of EU law and the autonomy of EU decision-making. This is to ensure that non-member states cannot affect the speed and direction of the integration in the EU. Likewise, any association agreement should ensure a balance between benefits and rights. In other words, the EU wants to avoid free riding and cherry picking of non-member states. Empirical analyses of the EEA show that the supply for opt-outs and tailor-made arrangement is higher in the EEA EFTA pillar of the EEA than in the EU pillar. Whether this actually allows cherry picking and free riding by the EEA EFTA States can be doubted. However, considering the increased politicisation of external differentiation, the possibility of doing so might be enough that the EU will try to determine the speed and scope of implementation of the new EEA-relevant EU law into the EEA Agreement more strictly. The EEA EFTA States will then have to decide what is more important for them: a high degree of homogeneity of EEA law or a certain leeway for flexible solutions.

A critical juncture for the EEA?

It is currently very unlikely that the UK will join the EEA. By contrast, it seems unavoidable that the politicisation of the EEA will increase in the EEA EFTA States as well as in relations with the EU. Thus far, the EEA EFTA

States have set the benchmark for external differentiated integration. The EEA Agreement is the most far-reaching association agreement that the EU has ever concluded with a non-member state and the EU has always highlighted the exceptionally good long-term partnership with the EEA EFTA States. It has to be seen whether the EEA EFTA States can keep their good reputation under the circumstances of an increased politicisation of the EEA. If not, Brexit might be decisive for them for selecting new paths of European integration. This can be the transformation of the scope of the EEA Agreement into a bilateral agreement between each EEA EFTA State and the EU. Such an agreement is likely to have a similar institutional framework than the one foreseen in the draft of the institutional agreement between Switzerland and the EU. Another option could be to keep the EEA Agreement but to simplify its procedures and give more authority and resources to its institutions.

As long as neither the EU and the UK nor the EU and Switzerland agree on a sustainable model for their future partnership, the EEA EFTA States do not have to worry that the EEA will come under too much pressure. However, it is important that they do not shy away from a debate on the future of the EEA. The EEA Agreement might have its shortcomings but it has ensured stability for the EEA EFTA States and the EU. This stability should not be compromised thoughtless. The debate should therefore focus on how cooperation with the EU can be improved and not how the EEA EFTA States can 'take back control'. The outcome of the negotiations on the post-Brexit UK-EU relations will undoubtedly affect the EEA Agreement but it has not necessarily to be a critical juncture that changes the path of institutional development of the EEA EFTA States' relations with the EU.