

Andorra, Monaco and San Marino in the EU's Internal Market: the one-pillar system standard

Blog | 16 November 2020

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The European small-sized countries Andorra, San Marino and Monaco were long left behind with regard to European integration. Now they are negotiating their participation in the Internal Market with the EU. To this end the EU is trying to apply an agreement-type standard, but which one?

Small-sized states pre-dating the era of national states

The Principality of Andorra, the Principality of Monaco and the Republic of San Marino (the AMS States) are European small-sized countries. Their particular status has developed over the centuries, and for different historical and political reasons they were not included in the development towards creating European national states.

Until the 1970s, the AMS States were seen to be included in the territory of the European Economic Community (EEC), or qualified as covered by Community law under Article 227(4) of the EEC Treaty (Article 355(3) of the Treaty on the Functioning of the European Union (TFEU)). This qualification was based on the assumption that the external relations of the AMS States were handled by a neighbouring EEC Member State. In 1987, Jacques Delors, on behalf of the European Commission, declared on the occasion of a written question from the European Parliament that Article 227 (4) of the EEC Treaty did not apply to Andorra, Monaco, San Marino or the Vatican because they were third countries to the Community. The political recognition of the sovereignty of the AMS States followed only gradually, particularly because of the dominant role of the neighbouring states. The EU's (EC's) relations with the European small-sized countries are mentioned twice in legally non-binding declarations: the first time in 1992 regarding the introduction of the euro in the Final Act (Declaration nr. 6) of the Maastricht Treaty, and the second in 2007 under the new article on neighbourhood policy in the Final Act (Declaration nr. 3) of the Lisbon Treaty.

The article on neighbourhood policy in the Treaty on European Union (TEU) contains a mandate to develop special relations with the countries in the Union's neighbourhood, in order to create an area of prosperity based on the values of the EU and characterised by close and peaceful relations and cooperation. Declaration 3 on Article 8 TEU states that '[t]he Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it'.

This was essentially done to reassure these countries, above all the AMS States, whose fears were that they would be isolated or relegated behind the major strategic partnerships in the east and south of

the EU. This declaration was also the starting point for negotiations that are currently underway to strengthen the association between the EU and the AMS States.

Scope of current relations

Until very recently, the EU as a whole did, indeed, not take a particular interest in the AMS States. This might explain why the current relations between the EU and those countries are rather underdeveloped.

Andorra and San Marino each form a customs union with the EU but are not part of the EU customs territory. In that respect, their situation is comparable to that of Turkey in its customs union with the EU. This means that the two countries benefit from 'most favoured nation' treatment. They have not, however, incorporated the EU's Common Agricultural Policy. In 2002, the agreement between the EU and San Marino was amended to also cover agricultural goods. This was not done in the agreement with Andorra given its particular interest in tobacco production. Neither country is part of the EU's VAT system, which would be necessary if they were to participate fully in the EU's customs territory. However, there are provisions on VAT in the agreement with San Marino, meaning that there are no border controls between San Marino and Italy. Conversely, the borders between Andorra and its neighbouring states are still tightly controlled. Monaco is in a different situation altogether because it became a de facto member of the EU customs union through its links with France when the EEC customs union entered into force in 1968. But there is no formal agreement with the EU.

Another important agreement concluded by the EU with each of the three AMS States is the monetary agreement. This agreement essentially allows the AMS States to make the euro their official currency and to mint their own coins.

A further agreement covering all three AMS States is the taxation of savings agreement, which was the result of a global campaign to eradicate money laundering and tax sheltering. In the case of the EU, the agreement was also aimed at forcing so-called offshore financial centres to conform to EU standards.

There is also a cooperation agreement between the EU and Andorra covering the environment, communications, information, culture, transport, regional and cross-border cooperation and social issues. In the case of San Marino, the customs union agreement contains a part on 'cooperation'. These agreements have, however, yielded few practical effects so far. In particular, there are no agreements with the EU on the free movement of workers, except for some minor provisions on social security, the right of establishment and the provision of services.

Lack of balance between EU and AMS interests

Generally, in its agreements with third countries, the EU aims at securing a balance of benefits and obligations. This is normally done in a comprehensive agreement or set of agreements. The picture of the relationship between the EU and the AMS States is, however, rather blurred with regard to comprehensiveness, uniformity and practical application, as well as regarding areas of interest to the EU and those of interest to the AMS States. The areas of interest to the EU are characterised by uniform rules, like on currency and taxation of savings. With regard to the former, this is quite understandable,

as the EU's aim is first and foremost to protect its currency and keep the respective control. Hence, the EU deliberately worked towards standardising relations with the small-sized states in order to safeguard its interests in a secure currency area, with the same obligations for all 'euro countries'. But also in the latter field, the EU concluded practically identical savings tax agreements with the AMS States (as with Liechtenstein and Switzerland). Its interests in the AMS States were obviously of a defensive character.

Conversely, in the areas of interest to the small-sized countries, legal relations are far from uniform. There are many differences regarding the free movement of persons (in particular Schengen), social security and trade. E.g., while goods produced in Monaco are, in Free Trade Agreements the EU concludes with third countries, automatically considered EU goods, those stemming from Andorra or San Marino are not. Goods produced in the latter two countries need to be expressly included in such agreements.

The lack of balance with regard to scope and form of the bilateral legal relations between the AMS States and the EU can be explained by the different historical, political, economic and social relations of the small-sized countries with their neighbouring state(s), and also by the different priorities and negotiation strategies of these states. Until recently, there was little consolidated EU policy towards these states. This is likely a reflection of the low strategic and economic relevance of the AMS States and consequent lack of interest and commitment by the EU to follow a more consolidated policy for the European small-sized countries.

The AMS States at the threshold of European integration

For some time the AMS States had expressed their interest in further developing relations with the EU, albeit with different weighting in terms of scope and extent. Monaco was generally satisfied with relations, but was interested in better access to the Internal Market in certain areas, albeit with extensive safeguard measures in favour of its own citizens and the free movement of persons and goods. Monaco has little to no interest in free movement of services, especially with regard to protecting its financial sector and legal services from competition. Andorra was open to many options, in particular a framework agreement with full access to the Internal Market with transitional periods and participation in EU programmes and agencies. Essentially, it aspired to an association like that of Liechtenstein, and viewed joining the Agreement on the European Economic Area (EEA Agreement) as one of these options. The most ambitious AMS State was San Marino, which was open to all possible options for deepening relations: a framework agreement, membership of the EEA and even accession to the EU. The latter was the subject of a referendum held in 2013, which missed the necessary quorum of voters and therefore was not binding upon the government. The EU therefore 'nudged' the three states in the direction of an association, which it hoped on the one hand would solve the issue in a way that would avoid cumbersome individual dealings with every single one of those states, and on the other would better suit their limited administrative capacities.

Setting the stage

In the EU, the further development of relations with the European small sized countries was officially discussed for the first time in 2010 on the margins of the discussion on the EU's relations with the

European Free Trade Association (EFTA). In connection with the progressive integration of the EFTA States, the EU Council pointed out that similar steps should be taken with regard to the AMS States.

For the EU, the further development of relations focuses in particular on greater business and employment opportunities for EU citizens and companies, and the dismantling of trade barriers.

An initial report on the EU's relations with the AMS countries was published in 2012. The European Commission provided this work, taking stock of relations in 2012 and identifying possible options for further integration. The two preferred options were either accession of the three AMS States to the EEA Agreement, or an association agreement (AA) consisting of a framework for all and specific annexes for every country. In the first case, the AMS States would first have had to join EFTA, as individual membership of the EEA is not possible. Given the reluctance of some of the EFTA States in that respect, the idea was dropped and only the option of an AA remained.

At the end of 2014, the Council gave the Commission a mandate to negotiate 'one or more association agreements' with the AMS States on behalf of the EU and its Member States. The somewhat odd formula stems from a French intervention on behalf of Monaco, as it was not clear yet whether the latter, given its special links with France, would need a more specific agreement on its own.

Challenges of the association agreement

With regard to substance, the content of the AA essentially aims at covering the same areas as the EEA Agreement. Interestingly, the EU made a special point of bringing labour and social security legislation and practices into line with EU standards.

Horizontally, the same institutional issues will be on the table as in other AAs of that kind, be that in bilateral agreements with Switzerland or the Withdrawal Agreement with the United Kingdom. Consequentially, the Council Conclusions demand a coherent, effective and efficient institutional framework to underpin the agreement, which (1) includes a forum for consultation between the Parties to ensure the smooth functioning and proper implementation of the agreement, (2) ensures the dynamic adoption of EU acquis by the three countries, (3) ensures the uniform application and consistent interpretation of the provisions of the agreement, and (4) includes a fair, effective and efficient dispute settlement mechanism.

Negotiations have been taking place since then, with the EU agreeing to take into account (some of) the specificities of each of the AMS States. The low administrative capacity of the three states is likely to be a particular challenge. The same is true for the free movement of persons, as immigration capacities of the AMS States are limited. Andorra in particular still has a high dependency of its agricultural sector on tobacco growing and manufacturing. The EU would rather see this disappear in a mid-term perspective. It is alleged that the EU might be willing to allow every one of the AMS States one 'exception'. This refers to the special arrangement Liechtenstein negotiated with regard to the freedom of residence in the EEA.

Elements of the draft association agreement behind the veil

Negotiations that were originally planned to be concluded by early 2019 are still ongoing or, rather, have not moved any further since early 2020. This is partly due to the fact that negotiations have not

advanced as expected, and because the three AMS States of course have quite different expectations and wishes, and are far from negotiating jointly in all respects. Contrary e.g. to the EFTA States, there is no common platform on which Andorra, Monaco and San Marino can coordinate their positions first. As alluded to earlier, their situations and backgrounds are, from both a political and economic point of view, quite different. And then there is the Coronavirus pandemic, which has also hindered negotiations.

From what is known about the draft AA, it generally follows the known models for participation in the EU's Internal Market. Here, of course, the EEA Agreement comes to mind first, as it is generally the benchmark for such agreements. With regard to the scope and content of the draft, it essentially follows that of the EEA Agreement, covering the four freedoms (goods, persons, services and capital), competition and related subjects and horizontal policies. In addition, a chapter on cooperation has been inserted. It refers to cooperation in anti-fraud matters, as well as good governance in fiscal matters. In order to reflect the differences in substance between the three countries in their relations with the EU, there are three protocols for each of the three AMS States.

Institutions inspired by the respective discussions between the EU and Switzerland

With regard to institutional provisions, the link with the EEA Agreement is less obvious. Contrary to the EEA Agreement, there is no two-pillar structure in the draft AA. In other words, the same institutional arrangements will apply to the AMS States but based on a common institutional framework. The three states on the other side of the negotiation table to the EU do not act as a common party like the EFTA States did when negotiating the EEA Agreement. In fact, the draft AA is structured like three bilateral agreements in one. Hence, there is one institutional pillar for the three states that includes the same rules and a common set of institutions. From this it seems logical that the institutional provisions of the AA allude to the structure of the draft Institutional Framework Agreement (IFA) between the EU and Switzerland, although not in the form of the current draft agreement.

Therefore, the competences for 'international mechanisms for surveillance and judicial control' are, in all other AAs concluded by the EU containing that degree of integration (apart from the EEA Agreement), with the European Commission and the Court of Justice of the European Union (CJEU) respectively. And for dispute resolution, like in the EEA Agreement, the procedure rests primarily with the Joint Committee. If no solution is found, however, in the case of the EEA Agreement, the parties can – if they agree to – submit a dispute to the CJEU concerning the interpretation of the provisions of the EEA Agreement, 'which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties' (Article 111 EEA). Hence, there is no possibility to seize the CJEU against the will of the EEA EFTA States. In contrast, according to the AA, any party can go before the CJEU. This is more or less copied from the first drafts of the IFA. However, Switzerland would not accept the competence of the CJEU to eventually decide on disputes with the EU, and conversely, it was not acceptable for the EU to have any other court but the CJEU interpret European law or provisions that were identical in substance. There, the compromise that was reached was that if the parties cannot settle their dispute in the Joint Committee, each party can appeal to an arbitral tribunal, which again must refer questions of European law and provisions that are identical in substance to the

CJEU. Its decisions are mandatory. Regarding the AMS States, there has been, to the knowledge of the author, no discussion of switching to an arbitration model as in the negotiations between the EU and Switzerland on an IFA.

Conclusions

Negotiations between the EU and the AMS States are currently not as advanced as might have been expected initially. It gradually became clear that putting the three countries into one AA with three individual protocols may sound efficient in theory but also creates a lot of problems. As Andorra, Monaco and San Marino have little more in common than being small in size, it is questionable whether this is sufficient to achieve a rather complex setup in order to grant these countries participation in the Internal Market. The lack of political and economic interest on the EU's part does not help either.

Contrary to other negotiations, especially those with very sovereignty-prone countries like Switzerland and the United Kingdom, the institutional setup of the draft AA seems somewhat less contested in the AMS States than in the negotiations with the aforementioned countries. This is certainly due to the more pragmatic concept of sovereignty, which is quite common to small states that have to rely on larger neighbours. Liechtenstein is a good example of that concept.

The EU is essentially trying to impose its 'one-pillar model' as purely as possible: Dynamic adaptation of the agreement, homogeneous interpretation, independent surveillance and judicial enforcement and dispute settlement. Maybe, in the long run, the EU will switch to more standardised AAs. Institutionally these could follow the above-mentioned model that has been developing all along, based on which it might be much easier to negotiate individual substantial content fitting all parties' interests. At least with regard to the AMS States, it still cannot be excluded that such a solution could emerge, thus fulfilling the allusion in the denomination of the expected result: '... or several association agreements'.

Further reading

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To cite this article

Baur, Georges (2020): Andorra, Monaco and San Marino in the EU's Internal Market: the one-pillar system standard. Blog. [EFTA-Studies.org](https://www.efta-studies.org).

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