

ABOUT THE CONFERENCE

The conference brought together experts and stakeholders from policymaking, civil society and academia, as well as a ‘witness panel’ with stakeholders involved in the Brexit negotiations. Christian Frommelt participated in the panel “Brexit in comparison: models of differentiated (dis)integration”. The panel was moderated by Kalypso Nicolaidis, Professor of International Relations at Oxford University.



DiCE Networking Conference on Brexit

In the run-up to the event, the panel participants were given three questions and asked to prepare a statement addressing each question. All panelists were experts on a specific integration model. The statements by Christian Frommelt summarised in this RECAP refer to the perspective of the EEA.

Statement 1 : Which model of external differentiated integration is most similar to the UK’s relationship with the EU?

In December 2017 the EU Chief Brexit Negotiator Michel Barnier presented a staircase with four steps. All of these steps refer to different models with different levels of integration. The Trade and Cooperation Agreement that the EU and UK have agreed on 24 December 2020 sets out preferential arrangements in areas such as trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes. It goes beyond traditional free trade agreements but does not provide the UK with the same access to the single market that is granted by the EEA Agreement or the Swiss-EU bilateralism. It can thus be compared to the EU-Canada Comprehensive Economic and Trade Agreement (CETA).

The UK’s institutional relationship with the EU will become more diverse in the next years with different arrangements inspired from different models.

A comparison of the different agreements and models of external differentiated integration is not always straightforward. This is particularly true with regard to the institutions and procedures determined by the treaty and thus the question of the extent to which the contracting parties - i.e. the EU and the respective non-member state - can retain their decision-making autonomy. There is not a single procedure and institutional set-up for each model but different procedures and institutional principles mix up in each model. In the case of the EEA this is particularly strong with various policy-specific modes of governance that range from strictly intergovernmental cooperation to subordination to supranational EU bodies. As a result, there are policies where EEA decision making is purely intergovernmental allowing the EEA EFTA States to opt out from EU policies or delay their incorporation and

others where there is actually no longer an EEA decision making in place because there is an automatic policy transfer from the EU to the EEA. These different institutional arrangements were not intended by the initial EEA Agreement but have been introduced over time in order to improve its administration. I therefore expect that the UK’s institutional relationship with the EU will become more diverse in the next years and will include different arrangements inspired from different models. This applies in particular regarding the institutional set up.



LIECHTENSTEIN-INSTITUT

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

Statement 2: The UK's withdrawing from the EU can be seen as a process of disintegration. Are there also cases of disintegration in the EU's external relations?

Differentiated integration is best explained by heterogeneous preferences and capacities. In the case of the EEA EFTA States, these heterogeneous preferences are particularly evident in reservations about political integration and a strong emphasis on national identity. Because all EEA EFTA States are wealthy and highly capable states, they can also afford to stay outside the EU even though more integration could bring economic benefits. External differentiation serves to mitigate the heterogeneity of preferences between the EU and the EEA EFTA States. However, it cannot overcome this heterogeneity. This is shown, among other things, by the fact that support for the EEA is high in the EEA EFTA states and has increased in recent years, while support for the EU has tended to fall.

The EEA is characterised by a conflict of goals. On the one hand, there is the goal of a homogeneous economic area and thus a level playing field. On the other hand, there are different procedures and institutions in place in the EU and the EFTA pillar of the EEA with different principles. The challenge of the EEA is further complicated by the high legislative dynamics in the EU, which the EEA EFTA States must keep up with to ensure the homogeneity of the EEA.

It is therefore important to distinguish between disintegration in terms of formal decision to decrease the level of integration through the withdrawal of an existing integration and centrifugal effects that produce a higher level of differentiation lacking a formal decision for more integration by some states. In the case of the

EEA disintegration is very rare. The only case I see is the EEA EFTA States' participation in the EU programmes. Until 2014 all EEA EFTA States

Processes of disintegration are very rare in the EEA. The only example is their selective participation in EEA-related EU programmes since 2014.

participated in more or less all EEA-related EU programmes. Nowadays their participation is much more selective. Of 15 EEA-related EU programmes there are currently only two programmes in which all EEA EFTA States participate. In all others there is just one or two EEA

EFTA State participating.

The basic legal acts on the respective programmes are incorporated into Protocol 31 to the EEA Agreement. If an EEA EFTA State does not participate in such a programme, this exemption is formally noted in the corresponding decision on incorporation. The selective participation in EU programmes goes back to the refusal of the Liechtenstein Parliament to approve the financial decision necessary for the participation in the EU research programme Horizon 2020. Since the EU accepted Liechtenstein's non-participation without much criticism, Liechtenstein and its EEA EFTA partners have also withdrawn their participation in other EU programmes.

In contrast to disintegration, centrifugal effects are very common in any dynamic model of external differentiated integration. The incorporation of new EEA-relevant EU acts into the EEA Agreement is often delayed. There are various reasons for these delays such as specific institutional

requirements of an EU act that are not fully compatible with the EEA's existing institutional framework or different regulatory preferences between the EEA EFTA States and the EU. In both cases, the contracting parties often negotiate for several years on possible adaptations to an EU act for the EEA context. Although these negotiations may only address one specific legal act, this usually also delays the incorporation of related legal acts. This was the case regarding the EEA EFTA States' participation in the EU system of financial supervision. Hundreds of EU acts could not be incorporated into the EEA Agreement and were therefore not legally valid for the EEA EFTA States as long as the conditions of the EEA EFTA States' participation was not clear. The delayed incorporation of some specific EU acts has thus produced centrifugal effects for the EEA EFTA States' integration

in the field of financial services. However, these centrifugal effects are mostly only temporary as the EEA EFTA States have repeatedly shown their willingness and capabilities to quickly reduce a backlog of legislation once the fundamental issues have been clarified. In other words, the dynamics in the relationship between the EU and the EEA EFTA States can be described as a continuous process in which the common body of law might be gradually reduced by the delayed incorporation of certain EU legal acts into the EEA Agreement, only to increase again abruptly when the problems underlying the delayed incorporation have been solved.

The time-consuming negotiations on the institutional and political conditions of the incorporation of a new EU act can also delay the incorporation of related EU acts.

Statement 3: To what extent do various kinds of relationships with the EU leave the necessary space for these states to negotiate differentiated and customised arrangements? Are we witnessing a backlash against such differentiated approaches on the part of the EU under the accusation of ‘cherry picking’ and fear of outside-in contagion?

Since the famous speech of Willy De Clerq in Interlaken in 1987, the basic principles of the EU for external differentiated integration have not changed. The EU wants to protect the autonomy of its decision making and legal order and also strives for an overall balance of benefits and obligations. Overall, the EU has been very consistent in protecting its principles. This explains why the EEA Agreement still includes only very few permanent opt-outs for the EFTA States.

Nevertheless, empirical analyses show that the supply of differentiated integration is higher in the EEA than it is within the respective policy area within the EU. To give an example, Liechtenstein is exempted from approximately 40 percent of the EEA *acquis*. Most of these exemptions refer to technical EU acts and many of those legal acts are still relevant for Liechtenstein as it applies Swiss law that is compatible with EU law. However, Iceland has various opt-outs as well. Both states benefit from the fact that these opt-outs could have been negotiated within the institutional framework of the EEA and from the fact that the EU does not show much interest in the negotiations with these two small states. Moreover, these two states are too small that their opt-outs could have a negative effect on the functioning of the European internal market and for lack of comparability with EU member states they do not constitute a precedent for the EU. By contrast, Norway only has very few permanent opt-outs but was repeatedly able to delay the incorporation of new EEA-relevant EU acts that were not fully in line with its preferences. Again, Norway could benefit from the institutional setting of the EEA.

In a nutshell, I argue that external differentiated integration gives

the EEA EFTA States an institutional bargaining power that makes it easier for them to do cherry picking. This is also the case for Switzerland. Compared to the EEA Agreement the institutional framework agreement that Switzerland and the EU have negotiated is favourable for the autonomy of Switzerland especially as the agreement does not provide for an independent surveillance authority such as the EFTA Surveillance Authority (ESA) in the EEA.

In the negotiations with the EU, the EEA EFTA States often play their cards very well. On the one hand, they highlight their commitment to the goals of the EEA and to European integration in general. The EU’s assessment of its relations with the EEA EFTA States is thus positive. On the other hand, they have used their leeway to accommodate at least some degree of differentiation within the EU’s four freedoms. This may well be called ‘cherry-picking’ as there is very little EU internal differentiation within these policy fields. Nevertheless, I currently do not see the EEA as a cause of an outside-inside contagion because the institutional framework of the EEA is far too complex and the institutional constraints that the EEA EFTA States face in the EEA are too high that this will become an attractive model for other states. A risk of an outside-in contagion is more likely to be linked to the Swiss-EU relations than to the EEA due to the bilateral, policy-specific, and mainly intergovernmental character of the Swiss-EU relations. However, there is a risk of greater politicisation of the EEA and external differentiated inte-

gration in the EU and the EEA EFTA States. One consequence of this could be that the administration of the EEA Agreement becomes more cumbersome and thus the centrifugal effects mentioned earlier become more frequent. As a result, the EU might try to determine the speed and scope of incorporation of the new EEA-relevant EU law into the EEA Agreement more strictly. In other words, the EU is likely to increase the pressure on the EEA EFTA States and leave them less room for manoeuvre. The EEA EFTA States will then have to decide what is more important for them: the proper functioning of the EEA based on a high degree of homogeneity of

EEA law or the demand for different integration based on their material and ideological preferences. Hence, the EEA EFTA States could also face more difficult times in terms of European policy.

Due to the bilateral, policy-specific, and mainly intergovernmental character of the Swiss-EU relations, the risk of an outside-in contagion is more likely to be linked to the Swiss-EU relations than to the EEA.

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