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Does the Norwegian Model offer sufficient access to EU policy making?

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Historical and political context

- EEA as model of differentiated integration
 - Different scope and institutions
 - Establishment of homogenous and dynamic economic area
 - Purpose of the EEA: Managing diversity
- Interlaken principles based on speech of Willy De Clercq, member of the EU Commission, May 1987
 - 'Community integration comes first'
 - 'Community's decision making autonomy must be preserved'
 - 'Balance between benefits and rights'
- EEA Agreement:
 - No right to vote for EEA EFTA States
 - Very limited access to the EU legislators



Definition and purpose of decision shaping

- Argument: A far-reaching access is highly important for the *legitimacy* and *efficiency* of the EEA Agreement.
- Definition: 'Decision shaping is the phase of preparatory work undertaken by the European Commission to draw up new legislative proposals. The EEA Agreement contains provisions for input from the EEA EFTA side at various stages before new legislation is adopted.'
(EFTA Secretariat 2019)
- Is a wider understanding more accurate?
 - Policy shaping?
 - Organisational inclusion?



Types of organisational inclusion

- Legally anchored decision shaping rights:
 - Seconded national experts
 - EEA EFTA comments
 - Involvement of EEA EFTA experts
 - Commission committees
 - EEA Joint Committee and EEA Council
 - 'Continuous information and consultation process' (Article 99)
 - Cooperation 'in good faith' (Article 99)
- Informal decision shaping mechanism
 - Political dialogue and lobbying with EU bodies, in particular EU Council
 - Political dialogue and lobbying with EU member states



Legal basis of policy shaping

- Programme committees (Article 81 EEA)
- Expert groups (Article 99 EEA)
 - ‘As soon as new legislation is being drawn up (...) seek advice from experts of the EFTA States in the same way as it seeks advice from experts of the EC Member States for the elaboration of its proposals’
- Comitology committees (Article 100 EEA)
 - ‘(...) as wide a participation as possible according to the areas concerned (...) shall refer to experts of the EFTA States on the same basis as it refers to experts of the EC Member States’
- Committees in very specific areas (Article 101 EEA)
- Protocol 1 of the EEA Agreement on horizontal adaptations
- *Due to the dynamic nature of EU governance, the provisions set out in the EEA Agreement are no longer sufficient to ensure the EEA EFTA States’ participation in the EU policy making.*



Annexes to the EEA Agreement: Typical wording to ensure EEA EFTA States' access to EU policy making

- 'The EFTA States shall participate fully in the Administrative Board and shall within it have the same rights and obligations as EU Member States, except for the right to vote.' (*European Railway Agency, JCD 82/2005 & 31/2010*)
- 'Each EFTA State may, in accordance with Article 4 of Commission Decision (EU) 2016/566, appoint a person to participate as an observer in the meetings of the high-level steering group for governance of the digital maritime system and services.' (*Steering group for governance of the digital maritime system and services, JCD 40/2017*)
- 'The competent authorities of the EFTA States and the EFTA Surveillance Authority shall, but for the right to vote, have the same rights and obligations as the competent authorities of EU Member States in the work of the European Supervisory Authority (European Banking Authority), hereinafter referred to as "the Authority", its Board of Supervisors, and all preparatory bodies of the Authority, including internal committees and panels, subject to the provisions of this Agreement.' (*European Banking Authority, JCD 199/2016*)



Rare (and controversial) examples of EU secondary law ensuring EEA EFTA states' access to EU policy making

- **Old BEREC regulation:** 'NRAs from European Economic Area (EEA) States and from those States that are candidates for accession to the European Union shall have observer status and shall be represented at an appropriate level. BEREC may invite other experts and observers to attend its meetings.'
(BEREC, REGULATION (EC) No 1211/2009)
- **New BEREC regulation:** 'In order to further extend the consistent implementation of the regulatory framework for electronic communications, the Board of Regulators, the working groups and the Management Board should be open to the participation of regulatory authorities of third countries competent in the field of electronic communications where those third countries have entered into agreements with the Union to that effect, such as EEA EFTA States and candidate countries.'
(BEREC, REGULATION (EU) 2018/1971)



Selected observations

- Flow of information
 - Basis for timely and effective implementation
 - Influence to development of EU *acquis* and EU programmes
 - Degree of influence difficult to assess
 - Examples: Consumer Rights Directive, REACH Regulation, prevention of ban on fishmeal in animal feed, threshold values in statistics
 - Practical lessons
 - Early engagement important
 - Success depends on resources and commitment by the EEA EFTA States
 - Practical restrictions such as limited access to documents have been reduced over time
- *Actual degree of access also depends on specific modes of governance in the policy field at stake.*



Conclusions: Policy shaping and efficiency

- Main purpose of the EEA EFTA States' access to the EU policy making is to increase the *efficiency* of the EEA Agreement.
 - 'The Contracting Parties shall cooperate in good faith during the information and consultation phase with a view to facilitating, at the end of the process, the decision-taking in the EEA Joint Committee' (Article 99 EEA)
 - Policy shaping secures flow of information that increases speed of EEA decision-taking as well as the quality of the implementation of EEA law by the EEA EFTA States.
 - Expertise-based policy shaping by the EEA EFTA States contributes to the mutual understanding of the contracting parties and to the overall reputation of the EEA EFTA States as constructive and credible partners.



Conclusions: Policy shaping and legitimacy

- EEA EFTA States' access to EU policy making cannot compensate for their lack of the right to vote in the EU policy making.
 - Policy shaping cannot ensure key principle of democratic governance such as the accountability of those who take decisions to the ones affected by the decisions.
 - Policy shaping increases the executive dominance in the EEA EFTA States.
 - Far-reaching policy shaping of the EEA EFTA States is often counterbalanced by a more hierarchical role of the EU in the EEA decision-taking.
- *EU policy shaping by the EEA EFTA States is key for output legitimacy of the EEA but it can contribute little to the EEA's input legitimacy.*



Conclusions: Policy shaping and differentiated integration

- EEA model fully respects the autonomy of the EU decision making.
 - Since the early beginning of the EEA negotiations a core principle of the EU
 - EU has never deviated from this principle (in contrast to other principles).
 - EEA model is likely to be the benchmark for future association agreements.
 - Draft of Swiss-EU institutional agreement more or less identical to EEA policy shaping but updated (comitology) and more precise.
 - Schengen model for policy shaping unlikely to be an option: Better access to EU Council but less flexibility for specific adaptations.
 - EU policy shaping by the EEA EFTA States can mitigate heterogeneous preferences and capacities of the EEA EFTA States and the EU.
- *However, the real problems between EEA EFTA States and the EU have to be solved by the EEA decision-making.*



Challenges

- What leeway does EU secondary law provide to enable non-member states full access to specific EU institutional arrangements?
- Is there some leeway for a more formal access of non-member states to EU legislators when updating the EEA Agreement?
- Can the EEA decision-making counterbalance the constraints in the EEA EFTA States' access to EU policy-making without threatening the EEA's effectiveness?



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