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THE EFTA STATES AND THEIR (UN)COMPLICATED RELATIONS WITH THE EUROPEAN UNION

Working Papers Liechtenstein Institute No. 84 (2023)



LIECHTENSTEIN-INSTITUT

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This paper is published within the framework of the initiative "Exploring Liechtenstein's and Poland's Perspectives on European Integration", supported by the Bilateral Fund of the European Economic Area Financial Mechanism 2014–2021 and the Norwegian Financial Mechanism 2014–2021.

Working Papers Liechtenstein Institute No. 84 (2023)
http://dx.doi.org/10.13091/li-ap-84

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ABSTRACT

On 1 January 1994 – nearly 30 years ago – the Agreement on the European Economic Area (EEA) came into force. It aims to create a homogeneous and dynamic economic area between the member states of the European Union (EU) and the members of the European Free Trade Association (EFTA) Iceland, Liechtenstein and Norway. Even today, the EEA Agreement is the most far-reaching and institutionalised agreement between the EU and non-member states and can therefore be seen as a benchmark for a privileged partnership with the EU. This article describes how the institutional rules of the EEA and the level of integration of the EEA/EFTA states have changed over time. It shows that developments towards more integration as well as more differentiation can be observed in the EEA. It thus addresses various institutional challenges in the relationship between the EU and associated states.

Keywords: EFTA, differentiated integration, EEA

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INTRODUCTION

The Russian war of aggression against Ukraine has given new impetus to political discussions on the enlargement of the European Union (EU). Even before this, there was an increased academic and political interest in external differentiated integration and thus in the relations of non-member states with the EU. The focus is mostly directed towards the east or south, but rarely towards the centre and north, where four other non-EU member states are located: Switzerland, Liechtenstein, Iceland and Norway. However, these countries are closely linked to the EU and have been for many years. They are therefore of interest for research into differentiated integration.

Economic theory suggests that small states are more likely to join a common market than larger and economically less advanced states due to factor allocation and economies of scale.[1] These integration incentives are further strengthened if geographically close countries already participate in a larger market. As all four members of the European Free Trade Association (EFTA) are small economies that are strongly orientated towards the EU, these countries should therefore have strong economic incentives to integrate. The EFTA states would also easily fulfil the EU's accession criteria. Nevertheless, they have not yet joined the EU.

Research has identified various factors to explain the EFTA states' reluctance to integrate. For example, reference is made to certain political specifics of the individual EFTA states, such as the rigid Icelandic party system and the over-representation of rural regions in Icelandic politics,[2] the strong contrast between centre and periphery in Norway[3] or the great importance of federalism and direct democracy in Switzerland.[4] With regard to the economy, the preference for policy field-specific and thus selective integration is explained primarily by the strong influence of individual, integration-sceptical economic sectors such as fishing in Iceland and Norway and agriculture and the financial services sector in Switzerland.[5] Cultural factors as well as the national history and specific identity concepts of the EFTA states are also said to have a major influence on their integration policy.[6]

In fact, the integration of the EFTA states in Europe is focussed on economic integration, while political integration and the associated transfer of national decision-making powers to European institutions are rejected. This reluctance motivated by sovereignty policy is also reflected in the institutional guidelines and principles of the EFTA states' relations with the EU. This article uses the example of the European Economic Area (EEA) to analyse how the reservations about political integration of the EEA/EFTA states have been implemented and to what extent the institutional framework of the EEA has changed over time.

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1 Walter Mattli: The Logic of Regional Integration: Europe and Beyond, Cambridge 1999.
2 Baldur Thorhallsson: The Skeptical Political Elite Versus the Pro-European Public: The Case of Iceland, in: Scandinavian Studies 3/2002, pp. 349–378.
3 Marianne Sundlisæter Skinner: Norwegian Euroscepticism: Values, Identity or Interest, in: Journal of Common Market Studies 3/2012, pp. 422–440.
4 Pascal Sciarini/Ola Listhaug: Single Cases or a Unique Pair? The Swiss and Norwegian 'No' to Europe, in: Journal of Common Market Studies 3/1997, pp. 407–438.
5 Christine Ingebritsen: The Nordic States and European Unity, Ithaca 1998.
6 Sieglinde Gstöhl: Scandinavia and Switzerland: small, successful and stubborn towards the EU, in: Journal of European Public Policy 4/2002, pp. 529–549.

The article shows that there is a tension between efficiency and effectiveness on the one hand and autonomy and legitimacy on the other with regard to the incorporation of new EEA-relevant EU law into the EEA Agreement. Maintaining the homogeneity of EU and EEA law requires an efficient incorporation. However, this can lead to various restrictions on the autonomy of the EEA/EFTA states. At the same time, experience since the EEA Agreement was signed in 1992 shows that the EEA/EFTA states have been able to protect their interests vis-à-vis the EU in various areas better than it was assumed when considering the high degree of asymmetry between the EU and the EEA/EFTA states.

The article begins with a brief insight into the history of the EEA. Following on from this, the EEA Agreement, its institutions and its procedures are described before the institutional requirements of the EEA are categorised in terms of integration policy. The article concludes with an examination of specific lessons learnt from 30 years of the EEA Agreement.

THE EMERGENCE OF THE EUROPEAN ECONOMIC AREA

In the 1980s, the increasing integration between the members of the European Economic Community (EEC; hereinafter referred to as the EU) and in particular the planned creation of a single market triggered "concerns of marginalisation and of being left behind" among the remaining EFTA states following the accession of the United Kingdom and Denmark to the EU.[7] The desire arose for a common economic area for the EFTA and EU states, which would supplement the bilateral free trade agreements for industrial goods that had existed between the individual EFTA states and the EU since the early 1970s.[8]

The key points of such an economic area were set out in a joint declaration in 1984, with reference to the existing economic interdependence. However, it took another eight years before the Agreement on the European Economic Area (EEA) was actually signed. Negotiations on the EEA Agreement were not easy. The EFTA states demanded unlimited exemptions from the EU acquis.[9] There were also differing views on the EFTA states' financial contributions to the economic and social cohesion of the EU. Ultimately, however, the search for an institutional framework for the desired association proved to be the greatest challenge.

The individual EFTA states were sceptical about political integration from the outset. Accordingly, they wanted to avoid a division of their national sovereignty through the introduction of qualified majority decisions or the creation of supranational institutions. They also demanded comprehensive involvement in the EU's decision-making processes for EEA-relevant policies, including the right to have a say. In contrast, the EU wanted to prevent "free-riding" and "cherry-picking" by the

7 Dirk Leuffen/Berthold Rittberger/Frank Schimmelfennig: Differentiated Integration. Explaining Variation in the European Union, Basingstoke 2013, p. 118.

8 Lise Rye: EFTA's quest for free trade in Western Europe (1960-92): Slow Train Coming, European Free Trade Association: EFTA Bulletin, July 2015, p. 4–17.

9 Sieglinde Gstöhl: EFTA and the European Economic Area or the Politics of Frustration, in: Cooperation and Conflict 4/1994, pp. 333–366.

EFTA states through selective participation in the European single market. For the EU, the focus was on preserving the integrity of its legal order and the autonomy of its decision-making.[10]

While a joint decision-making process was never realistic, the negotiators of the EEA Agreement originally agreed on an institutional framework that included a common EEA Court of Justice and an EEA Surveillance Authority. The European Court of Justice (CJEU) considered the creation of an independent EEA Court of Justice, composed of judges from the CJEU and the EFTA states and functionally integrated into the CJEU, to be incompatible with EU law.[11] As a result, the EFTA Court and the EFTA Surveillance Authority were created as a separate monitoring mechanism for the EFTA states.

Principles such as the autonomy of the EU decision-making process or the integrity of the EU legal order are still fundamental to the organisation of relations between the EU and non-member states today.[12] This has also been confirmed by the negotiations on future relations between the UK and the EU following the UK's withdrawal from the EU. The fact that the EEA Agreement has not undergone any significant changes since it was signed also speaks in favour of the continuity of these principles of external differentiated integration. The institutional framework and the functional scope of the EEA have therefore remained the same in principle.

THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA

The EEA Agreement was signed on 2 May 1992 by the then EFTA states of Iceland, Finland, Liechtenstein, Norway, Austria, Sweden and Switzerland, as well as the then EU member states. In December 1992, however, the Swiss electorate voted against Switzerland's accession to the EEA Agreement. In contrast to Switzerland, the majority of Liechtenstein voters voted in favour of joining the EEA. However, this only took place on 1 May 1995, after amendments to the EEA Agreement and the Customs Treaty between Liechtenstein and Switzerland made it possible for Liechtenstein to join the customs union with Switzerland and the EEA at the same time. Liechtenstein's accession to the EEA was very welcome. After Finland, Austria and Sweden joined the EU, only Iceland and Norway remained in the EFTA pillar of the EEA, which would have caused certain functional problems in the longer term. This applies in particular with regard to the EFTA Court and the College of the EFTA Surveillance Authority (ESA), which are each made up of representatives of the EEA/EFTA states and which decide by simple majority – which is naturally much easier with two members than with two.

But why did these first signs of disintegration already appear shortly after the EEA Agreement was signed? The EU largely prevailed in the EEA negotiations.[13] For example, the EEA/EFTA states were not granted any permanent exemptions from the internal market acquis. At the same time, the goal of a homogeneous and dynamic economic area requires that new EEA-relevant EU law is

[10] European Commission: Speech by Mr de Clercq at the EC-EFTA Ministerial Meeting, Interlaken, Speech/87/32, 20 July 1987.
[11] ECJ Opionion 1/91, 14.12.1991, ECLI:EU:C:1991:490.
[12] Marja-Liisa Öberg: Autonomy of the EU Legal Order: A Concept in Need of Revision?, in: European Public Law 3/2020, pp. 705–740, here p. 718.
[13] Gstöhl: EFTA and the European Economic Area, 1994.

incorporated into the EEA Agreement on an ongoing basis, whereby the EEA/EFTA states only participate in EU legislation in expert groups and committees of the European Commission – without the right to vote.

When the EEA Agreement was signed, it was therefore already clear that numerous EFTA states felt that their national interests would be better protected as EU members and therefore wanted to join the EU quickly. From the perspective of political science research, the EEA is also generally viewed negatively. The EEA was accompanied by a considerable loss of operational sovereignty for the EFTA countries, without them being offered satisfactory opportunities to have a say in return.[14] The EEA was therefore characterised as "legalised hegemony"[15], "fax democracy"[16], "semi-colonial"[17] and as a "hierarchical setting, in which EEA EFTA members have subordinated themselves to 'foreign rule'"[18]. More recent literature also characterises the EEA EFTA states as "rule-takers"[19] and the EEA[20] as "a case of hegemony" and "loss of sovereignty"[21].

In the three remaining EEA/EFTA states of Iceland, Liechtenstein and Norway, the EEA nevertheless has high approval ratings, while support for EU membership is currently very low.[22] Compared to EU membership, EEA membership is not equated with a loss of national autonomy, but rather with the extensive preservation of national autonomy. Against this background, the following sections will take a closer look at the institutions and processes of the EEA and their practice.

INSTITUTIONS OF THE EUROPEAN ECONOMIC AREA

The institutional organisation of the EEA can best be described as a two-pillar structure, with the EFTA institutions corresponding to those on the EU side. For example, the EFTA Court has similar tasks and competences in relation to the EEA/EFTA states as the CJEU has in relation to the EU states. The same applies to monitoring the implementation and application of EEA law. While the European Commission exercises this competence with regard to the EU states, the EFTA Surveillance Authority (ESA) does so with regard to the EEA/EFTA states.

The EFTA surveillance mechanism

There are only minor differences between the surveillance mechanism in the EFTA pillar of the EEA and that of the EU pillar. However, in view of the EFTA states' reservations about political

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14 Ibid, p. 333.
15 Thomas Pedersen: European Union and the EFTA Countries: Enlargement and Integration, London 1994.
16 Kjell A. Eliassen/Nick Sitter: Ever Closer Cooperation? The Limits of the 'Norwegian Method' of European Integration, Scandinavian Political Studies 2/2003, pp. 125–144.
17 Alfred Tovias: Exploring the 'Pros' and 'Cons' of Swiss and Norwegian Models of Relations with the European Union: What Can Israel Learn from the Experiences of These Two Countries?, in: Cooperation and Conflict 2/2006, pp. 203–222.
18 Sandra Lavenex/Dirk Lehmkuhl/Nicole Wichmann: Modes of external governance: a cross-national and cross-sectoral comparison, in: Journal of European Public Policy 6/2009, pp. 813–833, here p. 818.
19 John Erik Fossum: The EU and Third Countries: Consequences for Democracy and the Political Order, in: Journal of Common Market Studies, 2022, pp. 1–17, here p. 8.
20 Erik O. Eriksen: Political differentiation and the problem of dominance: Segmentation and Hegemony, in: European Journal of Political Research, 4/ 2018, pp. 989–1008, here p. 989.
21 Marja-Liisa Öberg: Friend Zone Forever? The Essence of and Justifications for the EU's Decision-Making Autonomy, in: Journal of Common Market Studies, 2023, pp. 1–17, here p. 1.
22 Christian Frommelt: 25 Jahre EWR-Mitgliedschaft Liechtensteins – Ergebnisse einer Umfrage, Bendern 2020.

integration, these should not be neglected, as they emphasise the intergovernmental nature of the EEA Agreement. The members of the ESA College are appointed exclusively by the governments of the EEA EFTA states and must not be confirmed by a parliament, as in the case of the European Commission. The same applies to the EFTA Court, where each of the three EEA/EFTA states itself decides on the procedure for appointing the national representative to the EFTA Court.

Another difference between the EU and EFTA pillars of the EEA is that no fines can be imposed on an EEA/EFTA state for non-compliance with a judgement of the EFTA Court. Judgements of the EFTA Court are not binding and the national courts are not obliged under the EEA Agreement to request an opinion from the EFTA Court in an EEA-related case, as provided for in the EU referral procedure. Finally, the small size of the EFTA Court with only three members and the low number of cases compared to the CJEU should be mentioned.

The aforementioned differences regarding the monitoring of implementation and application in the two pillars of the EEA have not yet fundamentally jeopardised the homogeneity of the EEA. The EFTA institutions are strongly orientated towards the corresponding EU institutions in the fulfilment of their tasks. In addition, great importance is attached to the principles enshrined in the EEA Agreement, such as the principle of loyalty and the proper functioning of the Agreement. The judgements of the EFTA Court have a high persuasive authority in practice and are complied with in the vast majority of cases.[23] Nevertheless, the differences listed above show that the institutional framework of the EEA reflects the integration policy reservations of the EEA/EFTA states. The demarcation between the EU and the EEA is also regularly subject of academic debate on the case law of the EFTA Court – e.g. with regard to legal principles such as the primacy of EEA law or direct applicability – without a clear doctrinal opinion on the specific differences between the EU and EFTA pillars of the EEA having been established to date.[24] There has also been no political analysis of the extent to which the current integration reality of the EEA corresponds to the original integration mandate of the EEA.

The common institutions

When categorising the EEA in terms of integration policy, it is almost more important to consider the adoption of law than the application of law. The EU and EFTA pillars of the EEA are linked by joint bodies. The formally most important body is the EEA Council, in which the foreign and European affairs ministers of the EEA/EFTA states and representatives of the EU and its member states meet twice a year.

However, the EEA Joint Committee decides on the incorporation of new EU law into the EEA Agreement. This is made up of representatives of the General Secretariat of the European Commission (until 2021, representatives of the European External Action Service, EEAS) and the three EEA/EFTA states (usually at ambassador level). The EEA Joint Committee meets six to ten times

[23] Skúli Magnússon: On the Authority of Advisory Opinions. Reflections on the Functions and the Normativity of Advisory Opinions of the EFTA Court, in: Europarättslig tidskrift 3/2010, pp. 528–551.

[24] Tarjei Bekkedal: Understanding the nature of the EEA Agreement: On the direct applicability of regulations, in: Common Market Law Review 3/2020, pp. 773–798.

a year and adopts around 300 decisions annually.[25] A decision can include the incorporation of several EU legal acts. The EEA/EFTA states take all decisions by mutual agreement. This means that national decision-making autonomy remains unaffected by EEA membership.

The EEA/EFTA states must speak with one voice vis-à-vis the EU. This means that before formal negotiations with the EU take place, the EEA EFTA states must reach an agreement among themselves. The obligation to speak with one voice vis-à-vis the EU is often seen as one of the greatest challenges of the EEA Agreement, as the preferences and capacities of the EEA/EFTA states may well diverge. If an EEA/EFTA state delays the incorporation of a new EU legal act into the EEA Agreement, it is also blocked for the other EEA/EFTA states. If an EEA/EFTA state refuses the incorporation of new EU act into the EEA Agreement, the parts of the EEA Agreement affected by the relevant legal act would be suspended for all three EEA/EFTA states – irrespective of the other EEA/EFTA states' willingness to adopt the respective EU act.

A single EEA/EFTA state can therefore theoretically block the further development of EEA law for all EEA/EFTA states. The principle of unanimity is particularly relevant with regard to a possible expansion of the EFTA pillar, as growing heterogeneity due to new members would make it more difficult to find a uniform position in the EFTA pillar. With regard to the current composition of the EEA, however, this principle is likely to have been beneficial for the functioning of the EEA, as it forces the EEA/EFTA states to cooperate and reduces the demand for country-specific opt-outs by the EEA/EFTA states, which in turn increases the homogeneity of EU and EEA law.

The other joint bodies of the two EEA pillars are the EEA Joint Parliamentary Committee and the EEA Consultative Committee. However, both have a purely advisory function and are therefore of secondary relevance for analysing the functioning of the EEA.

VARIOUS PROCEDURES FOR THE ADOPTION OF LEGISLATION

The purpose of the EEA Agreement is to create a homogeneous and dynamic economic area between the EEA/EFTA states and the EU member states. While the text of the agreement has not been amended since it was signed in 1992 – with the exception of minor adjustments following the entry and exit of states – the 22 annexes to the EEA Agreement and some of the 49 protocols are constantly updated by adopting new EU secondary legislation. Since the EEA Agreement entered into force on 1 January 1994, more than 11,500 EU legal acts have been incorporated into the EEA Agreement. No other EU agreement with non-member states is as dynamic thus far.[26]

The standard procedure

The EEA Agreement only provides for a single procedure for EEA decision-making. The so-called standard procedure takes into account the aforementioned integration reservations of the EEA

[25] An overview of the decisions of the EEA Joint Committee can be found at https://www.efta.int/legal-texts/eea/list-of-adopted-joint-committee-decisions-jcds

[26] For this study the planned agreements between the EU and the European microstates Andorra and San Marino have not been considered as they are not yet in force.

EFTA states and ensures that the EEA EFTA states do not transfer any legislative powers to the EEA institutions. It therefore comprises various procedural steps.

Within EFTA, the process of exploring the adoption of a new EU legal act usually begins long before it is published. Formally, however, the adoption procedure only starts with the official adoption of an EU legal act. The first step is to check its relevance for the EEA. If the legal basis of an EU legal act falls within the scope of the EEA Agreement, the European Commission marks it as EEA-relevant as soon as it adopts the draft. However, the classification drawn up by the Commission is not binding. In fact, a number of legal acts were incorporated into the EEA Agreement even though they were not labelled as EEA-relevant. Likewise, legal acts that were labelled as EEA-relevant were not incorporated. In recent years, however, the Commission's recommendation has gained in importance.

Furthermore, it is examined whether there is a need for EEA-specific adaptations. On average over many years, EEA-specific adaptations are made to around 15 per cent of the EU legal acts incorporated into the EEA Agreement.[27] These are mostly technical adaptations. If, for example, specific limits or regulatory provisions are listed in a legal act for the EU member states, corresponding values and thresholds must also be specified for the EEA/EFTA states. In around six per cent of the EU legal acts incorporated into the EEA Agreement, substantial adaptations are made by adapting the scope of an EU legal act for application in the EEA.[28] Such substantial adaptations are necessary, for example, if the provisions of an EU legal act are not compatible with the two-pillar structure of the EEA – e.g. if they provide for a transfer of competences from the EU Member States to the European Commission or an EU agency. An individual EEA/EFTA state can also be exempted from the application of an EU legal act.

Negotiations on any adjustments are conducted between the EEA/EFTA states and the Commission. The EFTA Secretariat assumes a coordinating role. On the EU side, substantial adaptations must be authorised by the Council. Finally, a new EU legal act is incorporated into the EEA Agreement by a formal decision of the EEA Joint Committee. However, in the EEA Joint Committee, each EEA/EFTA state can argue the existence of constitutional requirements. This means that the corresponding decision can only enter into force once the national parliament has given its consent to the decision.

Need for new procedures

Despite the generally good co-operation between the EEA/EFTA states and the EU, the standard procedure has proven to be too cumbersome in certain policy areas. In 2001, the EEA Joint Committee therefore decided to introduce a so-called "simplified procedure" for legal acts in the veterinary field. Specifically, the aim is to prevent different standards applying in the EEA and the EU due to a delay in the adoption of these legal acts, which are usually very technical but nevertheless sensitive e. g. from a health policy perspective. Under the simplified procedure, an EU legal act is therefore no longer formally incorporated into the EEA Agreement and an EU legal act is also

[27] Christian Frommelt: In Search of Effective Differentiated Integration: Lessons from the European Economic Area (EEA), Zurich 2017, p. 57.
[28] Frommelt: Effective Differentiated Integration, p. 57.

binding for the EEA/EFTA states once it has been adopted by the EU. The EEA Joint Committee merely takes note of the EU legal acts applicable on the basis of the simplified procedure retrospectively.

A fast-track procedure was also introduced in 2014 to further accelerate the incorporation of EU law into the EEA Agreement. This was introduced under pressure from the EU in order to speed up the incorporation of EU law into the EEA Agreement. The procedure applies to EU legal acts whose EEA relevance is undisputed, which do not require any adjustments and which do not entail any special national constitutional requirements. As this is an EFTA-internal procedure, the EEA/EFTA states themselves decide whether a legal act is subject to the fast-track procedure or the standard procedure.

The different number of procedural steps in the three decision-making procedures mentioned has an impact on the duration of the incorporation of new EU law into the EEA Agreement. In the case of the standard procedure, the time of adoption – i.e. the time from the adoption of a legal act by the EU to the decision of the EEA Joint Committee – takes on average 549 days, more than twice as long as the fast-track procedure.[29] In the simplified procedure, the EU legal acts are applied in the EU and the EEA at the same time, which is why it is not necessary to calculate the adoption period. Delayed adoption can mean that different rules apply in the EU and the EEA, which means that the objective of a homogeneous economic area is not fully guaranteed. Around half of the legal acts are currently adopted via the fast-track procedure, just under 40 per cent via the standard procedure and around 10 per cent via the simplified procedure.[30]

The list of adoption procedures is not exhaustive. Since 2018, there has been a specific procedure for the adoption of implementing acts in the area of data protection.[31] Accordingly, the measures contained in such a legal act are applied in the EEA/EFTA states at the same time as the EU member states, unless an EEA/EFTA state decides otherwise. In the event of non-application, the free movement of personal data would be suspended. In contrast to the standard procedure, however, the suspension is only limited to the state that refuses to adopt the implementing act. This means that the principle of unanimity in the area of data protection has effectively been abolished.

The EU agencies and other decentralised EU institutions are another special case. These organisations are not covered by the two-pillar structure of the EEA. If an EEA-relevant EU agency has decision-making powers vis-à-vis the EU member states, it is unclear where these decision-making powers should be located in relation to the EEA/EFTA states. The specific conditions for participation in EEA-relevant EU agencies will be determined by the EEA Joint Committee when these agencies are incorporated into the EEA Agreement. Based on existing practice, four models can be distinguished: The decision-making power is either delegated to the national authorities of the EEA/EFTA states, to the EFTA Standing Committee or to the EFTA Surveillance Authority, or remains with the relevant EU agency.[32] In principle, the further away the decision-making powers

[29] Christian Frommelt: Institutional Challenges for External Differentiated Integration: The Case of the EEA, Robert Schuman Centre for Advanced Studies: EUI Working Papers 65/2020, p. 21.
[30] Frommelt: Institutional Challenges, 2020, p. 19.
[31] Decision of the EEA Joint Committee No 154/2018, in: EU Official Journal, No L 183/23, 19.7.2018.
[32] Frommelt: Institutional Challenges, 2020, p. 25.

are located from the national authorities of the EEA/EFTA states, the more their decision-making autonomy is weakened.

If the decision-making competence remains with the EU authority, the autonomy of the EEA/EFTA states is therefore particularly affected – also because the EEA/EFTA states are usually represented in the decision-making bodies, but always without the right to vote. To date, there are only very few examples where an EU authority can take binding decisions vis-à-vis the EEA/EFTA states (e.g. the Aviation Safety Agency). If the decision-making competence remains in the EFTA pillar, the competent EFTA body must usually be guided directly by the requirements of the EU authority. This means that the autonomy of the EEA/EFTA states can also be said to be restricted in such a case. Concrete examples of this are the participation of the EEA/EFTA states in the European Financial Supervisory Authorities or the Agency for the Cooperation of Energy Regulators.

The various examples of newly introduced decision-making procedures show that the processes of the EEA have changed considerably since its entry into force. The following section therefore relates these changes to the reservations of the EEA EFTA states regarding political integration.

INTEGRATION POLICY CATEGORISATION

The new adoption procedures are essentially intended to ensure that there are no different regulatory standards between the EU and the EEA in policy areas characterised by a high degree of interdependence. They therefore contribute to the homogeneity and legal certainty of the EEA. At the same time, they ensure that the adoption of purely technical and therefore non-controversial legal acts does not tie up resources unnecessarily. The efficiency gains achieved with the introduction therefore strengthen the capacities of the EFTA pillar as a whole.

In view of the highly dynamic nature of EU legislation and the broad functional scope of the EEA, different procedures for the incorporation of EU law into the EEA Agreement appear unavoidable. However, the simplified procedure in the veterinary area in particular severely restricts the autonomy of the EEA/EFTA states, as it is an automatic policy transfer from the EU to the EEA. The procedure therefore contradicts the guiding principle of the EEA. In the case of the fast-track procedure, the decision-making autonomy of the EEA/EFTA states remains formally unaffected, but in fact this is also a largely automated process. The same applies to various EU agencies and their decision-making vis-à-vis the EEA EFTA states.

Compensation for restrictions on decision-making autonomy

Such restrictions on the decision-making autonomy of the EEA/EFTA states are compensated to a certain extent by their participation in the EU legislative process. In principle, the more automated the process of transposing EU law into the EEA Agreement is, i.e. the less room for manoeuvre the EEA EFTA states have for delays and adjustments, the more the EEA EFTA states are involved in the EU legislative process.[33] Legal acts that are adopted under the simplified or fast-track procedure are therefore exclusively legal acts that have been prepared by EU bodies in which the

[33] Sieglinde Gstöhl/Christian Frommelt: Beyond Downloading: Venues for Associated Neighbouring Countries to Influence EU Law and Policies, in: Journal of Common Market Studies, 19/10/2022.

EEA/EFTA states can participate. Although access to EU bodies within the scope of the EEA is always without voting rights, this access is very important and enables the EEA/EFTA states to help shape the content of EEA-relevant EU law. In contrast, the adoption period and the proportion of EEA-specific adaptations are particularly high for EU legislation adopted by the Council of the EU or the Council and Parliament, to which the EEA EFTA states have no formal access.

The new takeover procedures show that in the course of progressive integration in the EEA, purpose-driven legitimacy features such as efficiency and legal certainty have taken gain importance over the protection of national autonomy. If the new decision-making procedures are taken as a yardstick, the autonomy of EEA/EFTA states is not better protected than that of EU member states. However, the application of these new procedures is limited to policy areas that are characterised by high interdependence and low political salience. At the same time, the experience of almost 30 years of EEA membership shows that the room for manoeuvre of the EEA/EFTA states within the framework of the standard procedure is significantly greater than could have been expected when the EEA Agreement was conceived.

Weak EU leverage?

According to Art. 102 of the EEA Agreement, the adoption of new EEA-relevant EU law must take place "as soon as possible after the adoption of the corresponding new legislation" by the EU "in order to ensure legal certainty and homogeneity" in the EEA. In particular, the aim is to ensure that legislation in the EU and the EEA "can be applied simultaneously". However, as already mentioned, the incorporation of new EU legislation into the EEA Agreement often takes many months, in some cases even years. Between 1994 and 2016, for example, only around 20 per cent of the new EU legislation incorporated into the EEA Agreement was applied simultaneously in the EU and the EEA.[34] This proportion has increased due to the establishment of the new procedures. However, this has only marginally accelerated the adoption of politically sensitive legal acts.

A look at the official EFTA database "EEA-Lex" at the end of April 2023 shows numerous legal acts that have been pending incorporation into the EEA Agreement for several years. For example, the adoption of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed or Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes is still being examined. For other legal acts, such as Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations or Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, the endorsement decision is still being worked on. Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and

[34] Christian Frommelt: In Search of Effective Differentiated Integration: Lessons from the European Economic Area (EEA), Zurich 2017, p. 173. Legal acts that were adopted via the simplified veterinary procedure were not taken into account for this purpose. In individual cases, legal acts that have been adopted by a decision of the EEA Joint Committee but have not yet been approved by the national parliaments are applied provisionally.

insurance-based investment products (PRIIPs) has been adopted by the EEA Joint Committee, but has not been ratified in Norway for almost three years.

These are just a few examples of several dozen EU legal acts that have not yet been incorporated into the EEA Agreement, while they have long been applied in the EU. The majority of the controversial legal acts can be categorised under the policy areas of agriculture, financial services, energy and shipping/transport. From the perspective of the EEA/EFTA states, these are sensitive policy areas with potentially different regulatory preferences between the EEA/EFTA states and the EU. However, delayed incorporation can also be triggered by institutional issues. This applies in particular to legal acts that provide for a transfer of competences from the EU member states to the Commission or that establish a new EU authority that has no pendant in the EEA.

Art. 102 of the EEA Agreement provides that, in the event of a lack of agreement between the EEA EFTA states and the EU on the incorporation of a new EU legal act into the EEA Agreement, a procedure can be initiated that ends with the suspension of all parts of the EEA Agreement affected by this legal act. In view of the much greater dependence of the EEA EFTA states on access to the EU internal market than vice versa, this procedure is seen as weakening the negotiating position of the EEA EFTA states and thus as an effective deterrent against "cherry-picking". So far, however, this procedure has only been launched twice, with a swift agreement being reached on both occasions. As a result, parts of the EEA Agreement have never been suspended yet.[35]

In view of the aforementioned delay regarding the incorporation of EU law into the EEA Agreement, it is surprising that the EU does not use the leverage of suspending the affected parts of the EEA Agreement more often. The reluctance to make use of Art. 102 could be due to the fact that the EU traditionally favours compromises rather than tough negotiations. However, it can also be explained by the vague wording of Art. 102 and the lack of precedent. Among other things, it is unclear whether the Council (and thus the EU member states) or the Commission is responsible for invoking Art. 102. As long as the EEA/EFTA states do not explicitly oppose the adoption of an EU legal act, the threat of suspension therefore hardly seems possible, which is why the EU does not have much to oppose a delayed adoption by the EEA/EFTA states.[36]

Increased range of exemptions and special regulations

The EEA/EFTA states have not only succeeded in delaying the adoption of politically sensitive legislation, they have also been able to obtain certain special arrangements. Many of these special regulations are based on temporary exceptions in the original EEA Agreement, which were converted into more or less permanent exceptions after expiry by the EEA Joint Committee.

The smallest EEA member, Liechtenstein, has by far the most tailor-made arrangements. One particularly interesting example is Liechtenstein's special solution on the movement of persons, according to which Liechtenstein only has to issue a minimum number of residence permits to EEA

35 Frommelt: Institutional Challenges, 2020, p. 20.

36 An exception to this are legal acts whose adoption is a prerequisite for participation in a certain integration step. Specific examples of this can be found in the financial services sector, where the delayed adoption had a negative impact on the EEA/EFTA states, as it restricted their ability to trade in new financial services products (see also Frommelt: Institutional Challenges, 2020).

nationals each year. Above this minimum number, the government can control immigration to Liechtenstein autonomously, which is why EEA nationals working in Liechtenstein are not entitled to take up residence, contrary to the free movement of persons in the EEA. The special solution is based on a protocol to the EEA Agreement. This stipulated that Liechtenstein could maintain the immigration control rules in place at the time of EEA accession. This exception was limited until 1 January 1998. The special regulation in force today (which is more or less indefinite) is set out as a sectoral adjustment in the relevant annexes to the EEA Agreement. This has a reason as such sectoral adaptations only require a decision by the EEA Joint Committee, whereas the amendment of a protocol requires a complex ratification procedure, while the protocols to the EEA Agreement are considered to be mixed agreements. In addition to the substantive arguments in favour of a special arrangement due to Liechtenstein's small size and the low negative externalities that a tailor-made arrangement for the microstate of Liechtenstein has for the EEA as a whole, it was also the institutional rules of the EEA that made Liechtenstein's success in the negotiations possible.

The possibilities for country-specific opt-outs from EU law within the policy areas covered by the EEA are small. However, the conditions for offering differentiated integration appear to be more favourable overall in the EEA than in the EU. In other words, it can be assumed that Iceland, Liechtenstein and Norway, as full EU members, would be less successful in actually realising their demand for special arrangements and opt-outs and therefore would have a more limited leeway to protect their specific regulatory interests and capacities.

In sum, there are developments in the EEA towards both more integration and more differentiation. It seems neither possible nor appropriate to take stock of the different developments. In this respect, the question of the extent to which the EEA EFTA states have been able to maintain their autonomy cannot be answered conclusively. What is clear, however, is that a dynamic form of external differentiated integration requires a certain degree of flexibility and pragmatism from the contracting parties, as new institutional arrangements must always be agreed. Particularly in highly technical areas, a largely automatic adoption of EU law appears necessary in order to keep pace with the high legislative frequency of the EU. Conversely, experience from the EEA also shows that the specific institutional and political context of the EEA gives the EEA/EFTA states greater negotiating power than might have been expected due to the great economic and political asymmetry between the EFTA and EU integration areas.

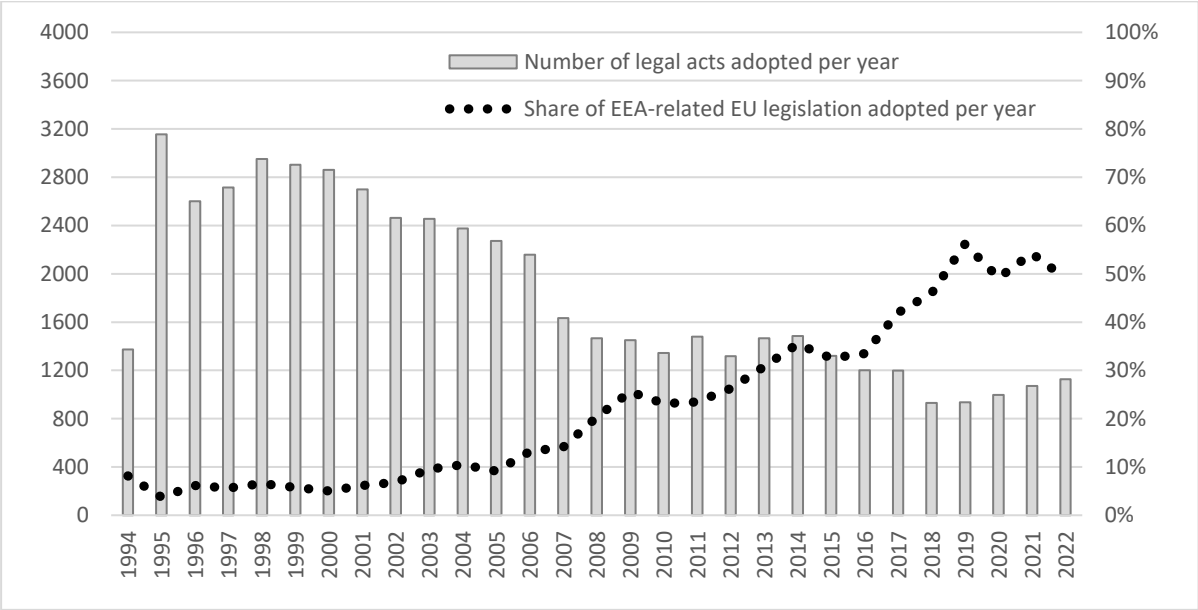
SCOPE AND LEVEL OF INTEGRATION

In addition to the free movement of goods, services, capital and persons, the EEA Agreement also covers horizontal and flanking policy areas in which co-operation is necessary to ensure a level playing field throughout the EEA. These include policy areas such as the environment and consumer protection. By contrast, the EEA Agreement does not cover the Common Agricultural Policy, the Common Fisheries Policy, the Customs Union, the Common Commercial Policy, the Common Foreign and Security Policy, Justice and Home Affairs or Economic and Monetary Union. Several of these topics are covered by bilateral agreements between the EU and the EEA/EFTA states.

Despite a growing number of such bilateral agreements, the EEA remains by far the most important agreement for Iceland, Liechtenstein and Norway in their relations with the EU.

It is difficult to quantify the actual level of integration of the EEA/EFTA states on the basis of the EEA Agreement. Figure 1 shows how the proportion of EEA-related EU law has developed since 1994. For the year 1994, the EUR-Lex database lists 1374 directives and regulations. Of these, 112 had an EEA reference. EEA-related legal acts are those that have been labelled EEA-relevant or have been incorporated into the EEA Agreement. The proportion of EU law with an EEA reference increased steadily from the turn of the millennium to a maximum of 56% in 2019. In recent years, the proportion appears to have stabilised at this level.

Figure 1: Development of EU law with EEA reference 1994 to 2022

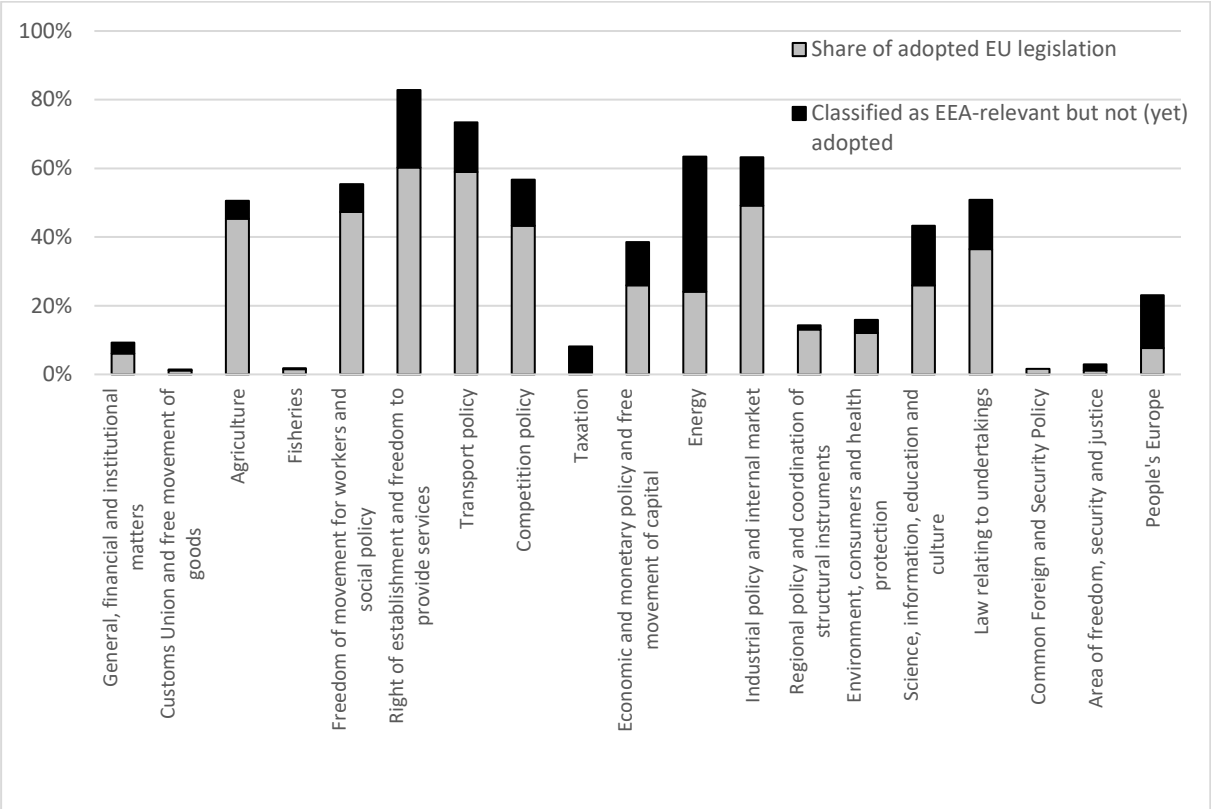


Note: Only regulations and directives were taken into account. The categorisation by year is based on the Celex number. Legal acts marked as EEA-relevant and legal acts incorporated into the EEA Agreement are EEA-related.

Source: own representation based on data from EUR-Lex.

Figure 2 looks at the EU law in place in January 2022. The level of integration of the EEA varies greatly between the policy areas specified by the EUR-Lex database. The chart shows two proportions in each case: The first share refers to the legal acts effectively adopted at the time of data collection. The second share refers to legal acts that have been marked as EEA-relevant but have not yet been incorporated into the EEA Agreement. The figure illustrates that the level of integration can vary greatly even within the functional scope of the EEA, which can be explained by the delayed adoption, among other things. In addition, EEA-relevant and non-relevant topics are intermingled, particularly in horizontal policy areas such as environmental, consumer and health protection.

Figure 2: Level of integration of the EEA/EFTA states on the basis of the EEA Agreement as at 1 January 2022



Note: Only legal acts that were primarily assigned to a chapter of the agreement were taken into account. Only directives and regulations were coded. The external relations chapter was not included.

Source: own presentation. The categorisation is based on the reference list according to the EUR-Lex database.

However, a certain degree of caution is required when interpreting the data. For example, the development of integration can be erratic, as packages of legal acts are usually incorporated into the EEA Agreement. The presentation also focuses on secondary legislation. At the level of primary law, there are hardly any differences between the EEA and the EU in the policy areas covered by the EEA.[37] Furthermore, the individual chapters also contain legal acts that only affect individual EU states or address EU institutional issues. By definition, these are not EEA-relevant. Finally, the presentation is limited to formal integration on the basis of the EEA Agreement, which means that integration through other agreements or other forms of Europeanisation than the formal adoption of legislation are not taken into account.

The level of integration of the EEA/EFTA states on the basis of the EEA Agreement is undoubtedly high, but nevertheless differs substantially from the EU. Even within the functional scope of the EEA, EEA membership cannot therefore be characterised as de facto EU membership. However, the proportion of EEA-relevant EU law has risen sharply since the EEA Agreement came into force.

[37] One exception here is the free movement of persons, as EU citizenship is not part of the EEA Agreement. However, this has only led to minor differences in the actual implementation of the free movement of persons in the EU and the EEA.

This emphasises the continued importance of the policy areas covered by the EEA Agreement for European integration. Increasing integration can be seen as a centripetal development, but in view of the risk of overburdening the EEA institutions with an increasing number of EU legal acts to be adopted, it also harbours the danger of a centrifugal development – i.e. a development towards more differentiation within the policy areas covered by the EEA.

EEA AS A MODEL FOR OTHER STATES?

The EEA Agreement aims to create a homogeneous and dynamic economic area between the EU and the EEA/EFTA states. It is the most far-reaching and institutionalised agreement between the EU and non-member states and can therefore be seen as a benchmark for a privileged partnership with the EU.

However, despite its generally good functioning, the EEA can hardly serve as a model for other states. The requirements for economic competitiveness and state administrative and control capacity are similarly high in the EEA as in the EU. This makes the EEA less attractive for states whose ability to join is unclear. Another argument against the integration of states such as Switzerland, the United Kingdom or the European microstates Andorra, Monaco and San Marino is that the EEA/EFTA states must speak with one voice vis-à-vis the EU. A growing number of EEA/EFTA states would inevitably lead to more heterogeneity within the EFTA pillar, which would make the decision-making processes in the EEA more cumbersome and is therefore not in the interests of either the EU or the EEA/EFTA states. Unsurprisingly, no other state is currently pushing for EEA membership. The future of external, differentiated integration is more likely to lie in bilateral cooperation between the EU and the respective associated state.

The positive perception of the EEA in the EEA/EFTA states is largely due to the lack of concrete alternatives to EEA membership. The new relations between the UK and the EU have hardly changed this. Compared to the current level of integration of the EEA/EFTA states, these represent a major step backwards, which would be fatal for the EEA/EFTA states, particularly from an economic perspective. Accordingly, Brexit has hardly had any impact on the European policy of the EEA/EFTA states, at least so far.

In contrast, the further development of relations between Switzerland and the EU could be relevant for the EEA. If the EU and Switzerland agree on an institutional solution that would allow Switzerland to extend its sectoral access to the EU internal market to new policy areas, an alternative to the EEA could exist for the first time. The material substance of the EEA could then be transferred to bilateral agreements between the EU and the individual EEA/EFTA states. At first glance, such a scenario seems unlikely. However, a switch to a bilateral model could be particularly interesting for Norway, which bears the majority of the costs of the EFTA institutions, but is least dependent on the support of the EFTA institutions due to its significantly greater administrative capacity in shaping its European policy compared to Iceland and Liechtenstein.

In order to maintain the attractiveness of the EEA, the EU must balance out any concessions to Switzerland with special rights of the EEA/EFTA states. This is the only way to maintain a balance of benefits, rights and obligations between the models. From today's perspective, however, it is

just as difficult to estimate what room for manoeuvre the EU has in this regard as it is to assess whether the EU would even favour a continuation of the EEA over bilateral agreements with the individual EEA/EFTA states. There have been repeated examples in recent years where the EU has shown little interest in preserving the two-pillar structure of the EEA and has instead favoured subordinating the EEA/EFTA states to the EU institutions in order to ensure the homogeneity of EU and EEA law. The unanimity of the EEA/EFTA states associated with the basic idea of the two-pillar structure did not always prove favourable to their integration. Analogous to the EEA/EFTA states, the positive assessment of the EEA from the EU's perspective can also be at least partially justified by the lack of concrete alternatives.

WHAT DO THE EXPERIENCES OF THE EFTA STATES TEACH US?

The common goal of a homogeneous economic area cannot conceal the different integration policy principles of the contracting parties. Despite the high level of integration, the integration policy of the EEA/EFTA states is still limited to individual policy areas and is therefore selective in principle. In terms of institutions and processes, the EEA EFTA states have shown a certain degree of flexibility, but national decision-making powers have only been transferred to EU or EFTA institutions in a few exceptional cases and only in very technical areas.

The functioning of the EEA is mostly assessed favourably by the contracting parties. The high level of material integration should be emphasised, which also extends beyond the actual cooperation in the four fundamental freedoms. For example, the high level of integration of the EEA/EFTA states provided "an excellent tool" from the EU's perspective to jointly overcome the challenges of the COVID-19 pandemic.[38] Another example is the introduction of safeguard measures against imports of certain steel products by the EU, in which the EU explicitly exempts the EEA/EFTA states from the restrictions associated with the safeguard measures, citing their close integration.

Cooperation between the EU and the EEA/EFTA states can be described as pragmatic and constructive. There is an ongoing and mostly very objective dialogue between the contracting parties of the EEA. Politically, the EEA/EFTA states have repeatedly committed themselves to the objectives of the EEA Agreement. In addition, they have endeavoured to contribute to improving the functioning of the EEA Agreement by introducing new procedures. As a result, they have succeeded in ensuring that issue-specific conflicts have not affected the general perception of the EEA.

EEA membership was rarely politicised in the EEA/EFTA states. From a democratic perspective, this can be viewed critically, as it has further consolidated the dominant position of the national executive bodies in the domestic debate on European policy. On the other hand, the low level of politicisation increases the efficiency of the procedures in the EEA. Consequently, one can speak of a legitimacy dilemma with regard to the EEA. Greater politicisation of the EEA – e.g. in the form of early involvement of national parliaments in the process of incorporating new EU law into the EEA Agreement – would increase input legitimacy. At the same time, however, output legitimacy

[38] European Council: Conclusions, 10514/22, 21/06/2022.

would be weakened, as extensive consultation and participation processes would lead to an (even more) delayed adoption and thus to a reduced homogeneity of EU and EEA law. Demands for more democratic participation and control therefore also have a price in the EEA.

This year, the EEA Agreement will have been in force for 30 years. After the turbulent early years, this anniversary is a success. The EEA/EFTA states have largely been able to keep pace with the dynamic development of the EU, while at the same time retaining their decision-making autonomy, at least in sensitive policy areas, thus distinguishing EEA membership from EU membership. However, the functional problems of delayed adoption described in this article and the various special regulations of the individual EEA/EFTA states also show that there is always a risk of cherry-picking and free-riding by the EEA/EFTA states.

In conclusion, three key lessons can be drawn for research on external differentiation. Firstly, the reality of integration in the EEA is increasingly difficult to typologise in view of the diverse institutional arrangements. Secondly, a state of complete homogeneity on the basis of different integration principles remains unattainable. Third, although the EEA Agreements provides for far-reaching integration, the level of integration of the EEA EFTA states is still significantly less than the one of the EU states (even those with a lot of opt-outs). If more integration means more complexity, the future of the EEA can be viewed critically, as the point may soon be reached at which the high level of integration can no longer be managed within the existing institutional framework. So far, however, the contracting parties have always found a solution to such institutional challenges. It is therefore definitely too early to call time on the EEA.

