

Practice of the two-pillar structure of the EEA or the struggle for stability

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Institutions are often the crux of the negotiations between the EU and non-member states. With its two-pillar structure, the EEA has long since found its institutional framework. But has it proved its worth in practice?

Stability, flexibility, complexity

The institutional framework of the European Economic Area (EEA) can best be described as a two-pillar structure. It comprises a pillar consisting of institutions of the European Union (EU) and a pillar with institutions of the European Free Trade Association (EFTA). The institutions of the EFTA pillar were created specifically for the administration of the EEA Agreement and are intended to reflect as closely as possible the competences of the institutions of the EU pillar. The two pillars are linked by several common institutions of the EU and the EEA EFTA states.

Three attributes can be assigned to the two-pillar structure: stability, flexibility and complexity. The classification of stability results from the fact that the institutional structure of the EEA has been in place for almost 25 years. The concept of the two-pillar structure has not changed since then. This is reflected, among other things, in the fact that the institutional provisions of the EEA Agreement have not been adapted since its entry into force. The Surveillance and Court Agreement (SCA), on which the EFTA Court and the EFTA Surveillance Authority (ESA) are based, has also undergone just very little changes.

However, this stability must not obscure the fact that the concrete competences of the individual institutions and the procedures linked to them have changed over time. For example, the EEA EFTA states have introduced new procedures for the incorporation of EU law into the EEA Agreement with the so-called simplified procedure or more recently with the fast-track-procedure. Also, over the past 25 years, a large number of EU legal acts have been incorporated into the EEA Agreement which contained specific institutional provisions that were not fully compatible with the two-pillar

structure of the EEA. When incorporating these EU acts into the EEA Agreement, it is therefore necessary that the EU and the EEA EFTA states agree on specific adaptations to the individual provisions of those EU acts that refer to the procedures and division of competences within the two-pillar structure. As a result, the EEA's two-pillar structure has been supplemented by a number of specific rules for decision-making and monitoring EEA law within the EFTA pillar. The same applies to rules on the exchange between the two pillars of the EEA.

Limits to flexibility

These adaptations have enabled the EEA to keep pace with the dynamic development of EEA-relevant EU legislation. The EEA EFTA states showed a high degree of pragmatism: In order to ensure the continued existence of the EEA, the basic principle of separate decision-making in the EU and EFTA pillars was qualified and the EFTA institutions were strengthened. A fundamental reorganisation of the two-pillar structure of the EEA, however, was always ruled out, as this would have represented a major political risk in view of the continuing scepticism towards increased political integration in the EEA EFTA states, but also the lengthy procedure required for this.

The various EEA-specific adaptations to the EU legal acts incorporated into the EEA Agreement made the institutional framework of the EEA even more complex by adding further rules to the already high number of institutions and procedures. One explanation for the increasing complexity of the two-pillar structure can be found in the constitutional barriers to integration in the individual EEA EFTA states. Norway and Iceland, for example, are unable to transfer substantial legislative powers to an organisation to which they do not belong. This constitutional restriction made it particularly difficult to incorporate the European Financial Supervisory Authorities into the EEA Agreement.

The European Supervisory Authorities have far-reaching decision-making powers vis-à-vis companies in the EU states. In line with the two-pillar structure, these competences should be located within the EFTA pillar with regard to companies in the EEA EFTA states. However, the question immediately arose as to whether an institution of the EFTA pillar had the same independence and expertise as the corresponding EU authority and whether the integrity of the EU internal market would not be jeopardised by two separate authorities.

The EEA EFTA states basically shared the EU position that, in order to protect the homogeneity of EU and EEA law and in view of ESA's limited resources, the relevant EU authorities should also be competent to take decisions vis-à-vis the EEA EFTA States. However, this was not possible due to the constitutional barriers in Norway and Iceland mentioned above.

The compromise reached after painstaking negotiations, namely that the EFTA Surveillance Authority decides on the basis of a draft by the relevant EU authority with regard to the EEA EFTA states, is neither particularly efficient nor can it be convincing in terms of democratic legitimacy. Nevertheless, this solution now seems to be establishing itself as a blueprint for similar cases - also because

Norway and Iceland lack the political will for a constitutional amendment that would enable a substantial transfer of competence directly to an EU institution in the future.

Consequences of high complexity

The flexibility of the Contracting Parties of the EEA required by the dynamic development of the EU has thus led to a more complex and increasingly opaque institutional structure. A high degree of complexity is usually seen as something negative. Among other things, it can be assumed that in a complex system the citizens know little about the respective procedures and institutions. This can lead to them identifying less strongly with a system. In recent years, the EEA EFTA states and the EFTA institutions have therefore made great efforts to raise awareness of EEA procedures. These communication measures are directed not only at the EEA EFTA states, but also at the EU states.

Another side effect of high complexity is low efficiency and therefore increased administrative costs. In the two-pillar structure of the EEA, this is reflected above all in the delayed incorporation of EU law into the EEA Agreement. This is usually not the result of deliberate delays by individual contracting parties, but the result of the large number of actors and procedures involved and thus inherent in the system. Moreover, the EFTA Secretariat often does not have the competences or the political backing in order to not only coordinate the decision-making in the EFTA pillar, but to actively promote it. But even in the EU pillar, the handling of EEA matters is not always efficient - either because of a lack of interest in the EEA or because of a lack of knowledge about its special features.

Recent measures such as the introduction of the fast-track procedure have increased the EEA's efficiency. However, since the fast-track procedure is only applied to selected policy fields, the problem of delayed incorporation could not be solved completely. In addition, the fast-track procedure is virtually an automatic transfer of rules from the EU to the EEA EFTA states, and can thus be viewed critically from the point of the EEA EFTA states' legislative autonomy.

Further challenges: Effectiveness and autonomy

Institutions must not only be efficient; they must also be effective. This brings up the question of the binding nature of the actions and decisions of the EFTA bodies. The fact that the Court of Justice of the European Union (CJEU) regularly refers in its rulings to rulings of the EFTA Court can undoubtedly be interpreted as recognition of the case law of the EFTA Court. Nevertheless, given the imbalance of power between the EU and the EEA EFTA states in the case of different interpretations of a point of law between the CJEU and the EFTA Court, it can be assumed that ultimately the opinion of the CJEU will prevail. This weakens the authority of the EFTA Court in the long term, which was particularly evident in the repeatedly tense relationship between the EFTA Court and the Norwegian Supreme Court. But also with regard to the Liechtenstein courts, an unpublished survey conducted in 2013 showed that almost 40 percent of the judges surveyed would prefer a direct legal route to the CJEU in the sense of an interpretation binding for the entire EEA.

Looking back at the early years of the EEA also shows that the ESA had to fight for its authority over the EEA EFTA states and the European Commission. An example of this is the unilateral introduction by Liechtenstein of a heavy vehicle charge, which the EU wanted to deal with in the EEA Joint Committee within the framework of the dispute settlement procedure provided for in Article 111 of the EEA Agreement, despite an ongoing procedure at the ESA. This was widely seen as a degradation of the ESA. However, the authority and credibility of the ESA has grown steadily over time, which is why nowadays neither the EEA EFTA states nor the European Commission question its competences. Nevertheless, ESA's activities and profile are naturally strongly determined by the European Commission and, more recently, by the EU agencies. Accordingly, the question remains as to how independent ESA can actually act.

Conclusions

At first glance, the EEA is convincing because of its high institutional stability. If one compares the EEA with other integration models, such as for the Swiss-EU relations, institutional cooperation between the EU and the EEA EFTA states also appears to be virtually harmonious. A closer look reveals, however, that the two-pillar structure constantly poses new challenges for the contracting parties to the EEA. These are based on the different preferences of the EU and the EEA EFTA states. While the EEA EFTA states want to avoid political integration as far as possible, the EU wants to protect the integrity of EU law and the autonomy of its decision-making processes.

This conflict already determined the negotiations on the EEA Agreement and is now continuing in the dynamic incorporation of new EU law into the EEA Agreement. At the same time, the EEA EFTA states have got stuck in the existing institutional structure of the EEA. Instead of examining real alternatives to the two-pillar structure, the contracting parties try to interpret it as flexibly as possible. This observation is consistent with the theory of path dependency, according to which the cost of leaving an existing integration model increases over time. A change in this policy is only conceivable in the course of a particularly drastic event. It remains to be seen whether Brexit and the institutional agreement between Switzerland and the EU will mark such events. The practice of the two-pillar structure of the EEA therefore remains demanding.

Citation

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