

## Extended Governance: The European Union's Policies towards its Neighbours

Sandra Lavenex, Nicole Wichmann (University of Lucerne), and Dirk Lehmkuhl (University of St. Gallen)

This Policy Brief describes the macro institutional set up of the EU's neighbourhood policies in a comparative way. It deals with the relations with those states that do not want to join the EU or that have not been offered the prospect of membership. The European Neighbourhood Policy (ENP) has been devised as a policy that should provide 'willing' neighbouring states with an alternative to enlargement, which is to cover 'everything but institutions'. The EU's approach to this kind of flexible integration, however, is not limited to the ENP, but also includes its European Economic Area neighbours and the EC-Switzerland Agreements.

Our approach to flexible integration builds on the concept of 'extended governance', referring to an expansion of the 'regulatory and the organisational' boundaries of the EU towards the territory of non-member countries. The 'regulatory boundary' dimension covers the amount of issues addressed by an agreement, the legal obligations arising from it and the modalities through which compliance is monitored. The 'organisational boundary' dimension refers to the stake third countries possess with respect to the shaping and implementation of decisions and the participation in agencies or programmes.

### 1. The European Economic Area (EEA)

The agreement with EEA neighbours, Norway, Iceland and Liechtenstein, covers a wide range of issue areas and provides for close institutional association. With respect to the regulatory boundary, the scope of the EEA is defined by those parts of the European Union's *acquis communautaire* that make up the Single Market. The EEA members did not only commit

themselves to taking over the *acquis* as it stood on the day of the conclusion of the agreement but, rather, agreed to 'dynamically' incorporate new legal acts. Over 300 legal acts are incorporated into the legislation of the EEA members every year. The dynamic commitments that EFTA member states subscribed to clearly go beyond conventional international law, while at the same time their legal obligations still do not achieve the same quality as that of the EU member states.

The EFTA 'Surveillance Authority' acts as the 'guardian of the treaty' and is the most important organisation that monitors the implementation of EEA law in the territory of the contracting parties. The Surveillance Authority can launch infringement procedures against non-compliant member states, but it is not equipped with the competence to impose financial penalties on EEA members. In addition to the Surveillance Authority there is also an EFTA Court that is responsible for enforcing legal homogeneity across the area of the EEA.

A particularity of the EEA Treaty is that it does not establish contractual relations between the EU and a third country - Norway, Iceland or Liechtenstein; instead it is a multilateral agreement concluded between the EU and the EFTA states as 'one party'. Alongside the idea that EFTA states have to decide jointly on the incorporation of legal acts in the EEA *acquis*, the complicated institutional architecture governing the relations between the EU and EFTA responds to the need to foster common positions among the EFTA states.

The Agreement rests on two 'pillars'. On the one hand, there are the joint 'EFTA-EC institutions' composed of representatives of both sides and the Member States; on the other, there are the institutional structures that have been put in place for the coordination of the

EFTA states' positions. The joint EU/EFTA structures resemble those established by other Association agreements: an EEA Council at the top of the institutional hierarchy, a Joint Committee at ambassadorial level and 'specialised' Sub-Committees and expert working groups dealing with the main function of incorporating new acts into the EEA *acquis*. Whereas the EEA Council has broadly defined 'political' powers to ensure the good functioning of the agreement, the Joint Committee is actually at the 'heart of the Agreement'. The Joint Committee is responsible for the implementation and the operation of the agreement.

While the EEA institutions did not provide for the extension of the EU's organisational boundary; the dynamic commitment spurred EFTA states' interest in influencing political decisions affecting EEA's regulation. Decision shaping can take various forms. Firstly, there are programme committees that are responsible for developing and managing programmes outside of the scope of the internal market. Secondly, there are the expert Committees that the Commission seeks advice from for the elaboration of new proposals. Thirdly, there are the Comitology Committees

assisting the Commission in the exercise of its executive powers. Finally, there is a list of other Committees that the EFTA members can assist. In practice 'decision-shaping' means that the EFTA experts get involved in the 'pre-pipeline' or agenda setting stage of drafting legislation, which is a phase during which the Commission consults rather broadly with all interested circles. The possibilities under the comitology committees are far more restricted. The Commission has committed itself to consulting the EFTA states, when it draws up the implementing measures that are discussed in the comitology committees. In addition EFTA members can make their voice heard through participation in EU programmes and they can also participate in specialized European agencies.

## 2. Relations with Switzerland

The cooperation between the EU and Switzerland is based on a series of bilateral sectoral agreements that were concluded in sectors 'of mutual interest'. Against the background of a history of failed 'association' attempts and a Eurosceptic Swiss electorate, 'traditional bilateralism' proved to be the only viable option.

With respect to the regulatory boundary, the approach of bilateral treaties is much more limited than the 'global' nature of the EEA agreement. The Bilateral Treaties I cover the free movement of persons, road transport, air transport, agriculture, research, public procurement and technical barriers to trade, whereas the Bilateral Treaties II extend to processed agricultural goods, statistics, association with MEDIA, association with Schengen/Dublin, taxation of savings, the fight against fraud, association with the European Environment Agency, pensions of EU officials and education, occupational training and youth.

Generally, EU-Swiss bilateral treaties are more closely modelled on the example of classical international agreements. Although some of them come close to 'integration' treaties by foreseeing alignment with the regulations and directives of EC law and by elaborating a procedure for incorporating new legislative acts into the Swiss domestic order (air transport and Schengen/Dublin), the majority are not dynamic and some are entirely 'static' (the agreements on the taxation of savings and the

### NEWGOV Policy Briefs

NEWGOV Policy Briefs are produced by the Integrated Project "New Modes of Governance – NEWGOV". The pan-European project examines the transformation of governance in and beyond Europe by mapping, evaluating and analysing new modes of governance. It is funded by the European Union under the Sixth Framework Programme from 2004 up to 2008. NEWGOV includes 24 projects and 3 transversal task forces and has more than 100 participating researchers from 35 institutions in Western and Eastern Europe.

Turn to our website [www.eu-newgov.org](http://www.eu-newgov.org) which offers topical information concerning the project, in particular publications, reports, articles and working papers of the Research Consortium for download, links to other information sources relating to the project's research fields, as well as regularly updated information on events organised in the framework of NEWGOV.

agreement on fighting fraud). In practice, however, the concept of an 'equivalence of legislation' (i.e. a sufficient substantive similarity between Swiss and European provisions) and the practice of voluntary adaptation to European provisions (autonomer Nachvollzug) led to the emergence of an '*acquis helveto-communautaire*'.

The monitoring procedure of the bilateral treaties is less sophisticated than its counterpart in the EEA agreement. With the exception of the air transport agreement that assigns competence to the European Commission and the European Court of Justice, the contracting parties of the bilateral treaties are responsible for ensuring implementation on their respective territories. In essence the implementation rests on the international law principle of 'good faith'. To ensure the good functioning of the agreements the joint committees have been endowed with the power to manage the implementation of the agreement and to settle arising disputes.

A further specific feature of the EU-Switzerland agreements is that the contracting parties vary: at times they are concluded between Switzerland and the EU (Schengen), the EC (most agreements) or the member states (free movement and fraud) individually or jointly. This multiplicity of contracting parties relates to the absence of an overarching 'association agreement'. This absence also explains why there is no political dialogue at ministerial level between Switzerland and the EU. Moreover, it also explains why sectoral DGs of the Commission rather than DG External Relations have the lead role in implementation. The intense involvement of sectoral experts, including the resolution of practical problems arising from implementation, distinguishes the relations between the EU and Switzerland from conventional diplomatic interactions.

Furthermore, the bilateral agreements also foresee a participation of Switzerland in the decision-shaping process. Examples are the possibility of Swiss participants to act as an 'active observer' with a right to speak, but not to vote, in the areas of research, air transport, social security and the recognition of diplomas. Moreover, the Commission has to consult with Switzerland on legislative proposals that further develop the *acquis* in areas in which 'legislation' is equivalent. However, the open

### Further reading

This policy brief is based on research carried out within the NEWGOV project no. 16 on "Inside-Out: New Modes of Governance in Relations with Non-Member States". The Inside-Out Project aims at examining in how far and why non-traditional modes of co-operation find entry into institutionalised forms of co-operation with third countries. With its focus on new modes of governance in the EU's external relations, this project contributes an external view to the integrated project. The Inside-Out Project studies EU relations in a six sector-seven country design, with the countries belonging to three regions in the EU's near abroad

Further information can be found on the NEWGOV Website in the [special section](#) of project no. 16.

isolation' is equivalent. However, the openness of sectoral DGs is at odds with the Legal Service's scepticism towards accepting these special solutions for non-members.

### 3. The European Neighbourhood Policy (ENP)

The current level of economic and political interdependence between the EU and the neighbours in the South and East is far below that of Switzerland and the EEA countries. As a consequence, the asymmetries between the shift in the regulatory and organisational boundaries in the interaction between the EU and these countries are hardly surprising.

With respect to the regulatory boundary, there are significant differences between the ENP both the EEA and the Agreements with Switzerland.

The ENP is not an international agreement on its own, but encompasses two kinds of provisions. On the one hand, it includes prior Partnership and Cooperation Agreements (PCA) and Association Agreements (AA). Given that a number of issue areas were added to the EU's domains of competence since 1994, the revision of the substance of PCAs and AAs became necessary. On the other hand, there are the provisions added by the ENP that extend the scope of cooperation to 'new' areas,

such as justice and home affairs or cooperation on the information society. The ENP is best understood as a process that should culminate in the conclusion of a next generation of contractual agreements, the 'Enhanced Neighbourhood Agreements'. Notwithstanding its comparatively more comprehensive approach, the substance and wording of the ENP remains vague and less specific than both the EEA and the bilateral treaties between the EU and Switzerland.

Three different types of provisions characterize the relationship between the EU and the ENP countries. A first group of provisions focuses on 'enhancing cooperation' with the EU for instance in the areas of 'infrastructure' or people-to-people contacts or research. A second group stipulates an 'approximating' legislation in third countries with EU rules and standard, while a third group addresses the 'promotion of commitment to shared values in the third countries'. Only the first type of measure, that of 'enhancing cooperation', resembles provisions that can be found in the agreements with Switzerland and the EEA countries, while the other two are specific to the ENP. Indeed, 'approximation' is a down-scaled version of the alignment or 'equivalence of legislation' stipulations contained in the relations with the EEA countries and Switzerland. Yet the choice of the term 'approximation' signals a fundamental difference from the agreements considered hitherto in that the ENP does not intend to create a 'legally homogenous' space with the ENP countries. In practical terms, however, the EU considers its own 'standards' as a model, which third countries might want to follow.

The resemblance to the enlargement mechanisms, which finds expression by the reference to the concepts of 'approximation' and the commitment to 'shared values', is also displayed in the political nature of 'monitoring of compliance' under the ENP. The characteristic features are unilateral 'progress' reports drawn up by the European Commission and the ensuing discussions in the various formats of the AA and PCA Councils. Despite the fact that there are differences with respect to both the composition of participants in the various implementation fora (some countries send 'directors' from their national administration accompanied by experts, while others send

higher level officials and diplomats) and the representation of the EU (Commission officials speaking about issues of Community competence and Presidency representatives speaking on behalf of the Council) the implementation is more akin to 'traditional diplomatic' meetings, whereby there are also examples of expert-based interaction (e.g. in relations with Ukraine). Put differently, the shift of the organisational boundary is very limited and does not include any participation in decision-shaping.

To conclude, neighbourhood relations differ from conventional external relations in that the EU displays a strong interest in exporting its regulatory policies to the neighbouring countries while at the same time it lacks its most successful foreign policy instrument: accession conditionality. At the same time, the macro-institutional perspective on governance features in the EU's neighbourhood relations reveal significant differences in the way the EU translates its interest into institutionalised patterns of interaction between the EU and its neighbouring countries. While the shift of the regulatory boundary has been accompanied by the opening of the organisational border in the cases of EEA and to a lesser extent in the bilateral treaties with Switzerland, the ENP has only started to consider granting membership to European agencies and programmes. As the experience of the Western neighbours shows, participation in such structures is not only supportive to the third countries' approximation to EU policies, it also increases the sense of partnership and co-ownership, thus fostering the legitimacy of such regulatory approximation.

### Bibliography

- Lavenex, Sandra (2004), 'EU External Governance in 'Wider Europe'', in *Journal of European Public Policy*, 11:4, pp. 688-708.
- Lavenex, Sandra, Lehmkuhl, Dirk, Wichmann, Nicole (2008), 'Die Nachbarschaftspolitiken der Europäischen Union: zwischen Hegemonie und erweiterter Governance', in Ingeborg Tömmel (ed.), *Die Europäische Union. Governance und Policy-Making*, PVS-Sonderheft 40/2007, Wiesbaden: VS-Verlag, pp. 367-388.