

THE EU'S NON-MEMBERS INCORPORATION WITHOUT PARTICIPATION



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ARENA Centre for European Studies
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INTRODUCTION

CHRISTOPHER LORD

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PROGRAMME - PART 1

- 14:10 **Norway's EU affiliation: Democratic self-harm?**
Erik O. Eriksen
- 14:25 **Surrogate representation in Brussels**
John Erik Fossum
- 14:40 **The paradox of an outsider: Depoliticized citizenship**
Espen D. H. Olsen
- 14:55 **Democracy or action capacity?**
Norway-EU relations in foreign and security policy
Helene Sjursen
- 15:10 **Coffee break**



NORWAY'S EU AFFILIATION DEMOCRATIC SELF-HARM

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2014: Celebrations with an aftertaste

- Norwegian Constitution's 200th anniversary
- EEA Agreement 20th anniversary
 - European Economic Area established in 1994
 - Today: Norway, Iceland, Liechtenstein + EU
 - Norway's permanent form of affiliation with the EU
- Radically changed constitutional context

EEA and European integration

- EU countries pooled and shared sovereignty, co-determination of common matters in return
- EEA Agreement with constitutional implications
- Norway since 1994:
 - Every government brought Norway closer to the EU
 - A number of additional parallel agreements
 - Approx. $\frac{3}{4}$ of EU legislation also applies to Norway

EEA Agreement

- Dynamic framework
- Homogeneity principle
- Norway cannot oppose EU directives without jeopardizing the EEA Agreement
- Damaged democratic chain of rule
- Achieved the opposite of the main objective of voting 'no' to EU membership in 1994
- Norway fallen into the **integration trap**

Incorporation without co-determination

- Norway has rejected the opportunity for co-determination believing that national sovereignty and self-governance could be protected
- Today the EU defines the framework with implications for Norwegian self-governance
- Loss of democracy: renounced sovereignty without compensation in the form of co-determination



NORWAY'S RELATIONSHIP TO THE EU

A CASE OF SURROGATE REPRESENTATION

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Norway's relationship to the EU

- The EEA structure papers over a deeply asymmetrical relationship
 - Norway is a rule-taker only
- Norway not formally, but nevertheless indirectly, subject to the precepts of supremacy and direct effect
- In today's Europeanised reality, Norwegian parliamentary government is increasingly programmed by external actors and rules
 - Notably EU-based ones but also other

Rapid EU incorporation without EU membership debate

- Paradox: ‘Whereas the question of Norwegian EU membership has been and continues to be one of the most contested issues in Norwegian politics, Norway’s ongoing affiliation with and incorporation in the EU has been marked by a *low level of conflict*’
(Outside and Inside NOU 2012:2:20)
- Party system maintains this paradoxical situation
- Consecutive coalition governments have instituted ‘gag rules’, ‘suicide pacts’ and other arrangements to keep the issue of Norwegian EU membership off the agenda

- The Norwegian political system can adapt to the EU without having to deal with the politically controversial membership issue
- ‘Gag rules’ and coalition agreements and other ways of ducking the membership issue *promote rapid adaptation*
- The net effect is to avoid having to discuss the principled and constitutional aspects of the adaptation process

Norway as a lobby-nation?

- This is a frequently used depiction of Norway
- Implies that both public and private actors are lobbyists
- Norwegian authorities are then only ‘one among many’
- Norwegian authorities are formally speaking democratically authorised by Norwegian citizens to speak on behalf of them

- Norway's relationship to the EU is legally regulated – with rights and obligations for Norwegian governments and citizens
- Norwegian authorities must implement EU decisions whether they have been effective lobbyists or not
- EU is a representative system where Norwegian authorities engage in forms of interaction that are distinctive for governments

Norwegian representation

Various forms of representation in this system:

- experts in the Commission
- can participate in Schengen bodies (even at political level but without voting rights)

The Norwegian Parliament:

- 6 out of 24 members of the EEA Joint Parliamentary Committee
- right to attend the recently created Interparliamentary Conference on CFSP-CSDP
- ‘special guest’ at COSAC meetings (by invitation)
- office in Brussels (in the EP, together with NPs’ representatives)

Formality versus reality

- This is about information and consultation, not decision-making

Therefore:

- The Norwegian Parliament passes the laws, but in reality the laws are made by political representatives in the EU; they make the laws on behalf of Norwegian citizens
- Norway's relation to the EU can be understood as representation but without politically elected representatives in the EU

How democratically problematic?

- Mainly technical issues that are not very controversial
- The EU decision-making process draws on a broad-based system of technical and other forms of expertise: decisions are based on expert knowledge
- Norway is formally independent
- Norway's relationship to the EU is about balancing the need for participation/representation with effective governing ability

- None of these arguments are compelling
- It is not possible to balance political participation and governing ability without politically elected representation – one part of the equation is missing

What marks Norway's representative relation to the EU?

- Here it is important to distinguish between general representation and political representation
- We may be represented by someone even if we have not chosen these representatives in political elections

Virtual representation

‘Virtual representation is that in which there is a communion of interests and a sympathy in feelings and desires between those who act in the name of any description of people and the people in whose name they act, though the trustees are not actually chosen by them. This is virtual representation.’

(Burke 1792: 23)

Interest correspondence and affinity, *not* political election

- This is a pre-democratic, paternalistic and 'colonial' form of representation
- It was precisely this form that the American colonialists rejected with the statement:
'no taxation without representation'
- Edmund Burke extolled the value of virtual representation but also noted that the American colonialists were *not* virtually represented prior to the American revolution

But there are efforts ...

- Norwegian authorities have steadily sought to get EU representatives to promote Norway's case, i.e, serve as surrogate representatives
- Swedish MEP Christofer Fjellner has stated that: 'I think a lot of how various EU decisions affect Norway and have previously taken Norway's side in various issues. I have for instance argued that the anti dumping measures against Norwegian salmon were unfair.'

Surrogate representation

‘Representation by a representative with whom one has no electoral relationship – that is, a representative in another district [...]

In surrogate representation, legislators represent constituencies that did not elect them. They cannot therefore be accountable in traditional ways’

(Mansbridge 2003: 522, 524)

Conundrum

- Norway is dependent on other politically elected representatives promoting Norway's interests
- Norway and Norwegian citizens no credible ways of instructing what the Norwegian interest is
- Neither the Norwegian government nor Norwegian citizens have any ways of holding them to account for their actions
- EU representatives few incentives to promote Norwegian interests, partly because Norwegian citizens have voluntarily chosen this situation

Conclusion

- Deciding not to be politically represented works as long as we:
 - A) retain control of those issue-areas that we have decided *not* to be politically represented in
 - B) can determine the rules and conditions under which we decide

- But in the EU the decisions and the broader framework of rules are determined in joint bodies where EU member states and citizens have access
- This system of co-decision increasingly sets the terms of self-rule and not the opposite, as we are used to in the conventional understanding of state sovereignty
- In such a system formal sovereignty is not a good yard-stick for the degree of real autonomy

- Norway as an incorporated non-member without co-decision is not able to partake in the process that determines the rules and conditions for member states' self-rule
- That undermines Norway's ability to decide the contents of and the broader conditions for Norwegian self-rule



PARADOXES OF THE OUTSIDER DEPOLITICIZED CITIZENSHIP IN NORWAY

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Citizenship and constitution

- Citizenship: membership status of a state regulated through the constitution
- Citizens are ‘the authors’ of laws through the constitution
- Public autonomy:
 - Political rights, social rights and participation
- Private autonomy
 - Civil rights and economic rights

Norway as outsider: Effects on citizenship

- Norway member of the EEA through citizens' consent: voted for by representatives in the Storting
- End of story?
- No, the EU has developed further than expected in 1992
- Deepening and widening of the EU
- Array of new rights for EU citizens
- Norwegians: have economic rights, no political

Scandinavian comparison

- Denmark: opt-out from EU citizenship, vibrant debates about EU rights, active Folketing in EU issues
- Sweden: full EU citizenship, implemented whole acquis, less active Riksdag on EU issues
- Norway: rights through EEA, transposes EU law continuously, no political rights in EU decisions

The paradox

- Norway's no to EU membership was a strongly politicized moment: heated debates, high voter turnout (89%) and a definite answer on full EU integration
- 'The No side won in 1994, but has lost every day since then' (Kåre Willoch, former PM)
- Norwegian citizens have become strengthened as *homo oeconomicus*, but weakened as *homo politicus*.
- A creeping 'depoliticization' of Norwegian citizenship



DEMOCRACY OR ACTION CAPACITY?

NORWAY-EU RELATIONS IN FOREIGN AND SECURITY POLICY

HELENE SJURSEN

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COFFEE BREAK

15.10-15.25



PROGRAMME - PART 2

- 15:25 **The EEA and the case law of the ECJ:
Incorporation without participation?**
Halvard Haukeland Fredriksen
- 15.40 **The EEA vs. bilateral agreements: The Swiss case**
René Schwok
- 15.55 **The expansion of the EU's economic community:
Lessons for the neighbours**
Sieglinde Gstöhl
- 16.10 **Panel debate**
- 16.45 **Cocktail reception**

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The EEA and the case-law of the ECJ: Incorporation without participation?

Prof. Dr. Halvard Haukeland Fredriksen

Philanthropy House, Brussels 23 June 2014



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The complex judicial architecture of the EEA

- No common EEA Court of Justice
- No compulsory ECJ jurisdiction over the EEA EFTA States
 - Possible under Articles 107 and 111 EEA, but left to the discretion of the EFTA States (and never used)
- An independent EFTA Court
 - With a comparatively weaker position *vis-à-vis* the national courts (Art. 34 SCA – no obligation to refer; merely advisory opinions)
- A comparatively bigger role for the highest courts of the EEA EFTA States (Art. 106 EEA and Art. 34 SCA)
- Full deference to the independence of the courts (15th recital of the preamble)
- Only the EFTA Surveillance Authority or another EEA EFTA State may initiate infringement proceedings before the EFTA Court (not the Commission or an EU Member State)
- Dispute settlement by political means (Art. 111 EEA)



The untouched position of the ECJ

- Suggested provision on a duty of the courts (the ECJ included) to pay “due account” to decisions delivered by the other courts removed as a result of the ECJ’s Opinion 1/91
 - Cf. Art. 3 (2) SCA: The EFTA Court shall pay due account to the principles laid down by relevant rulings by the ECJ
 - Cf. the 2007 Lugano Convention, Protocol 2, Art. 1
- Protocol 48 EEA: Decisions taken by the EEA Joint Committee under Articles 105 and 111 may not affect the case-law of the ECJ
 - Provides for the “reception” of new rulings of the ECJ by means of measures taken by the Joint Committee (Commission before the ECJ in Opinion 1/92)
 - “The Joint Committee, as a political organ, ostensibly given the task of reconciling differences between the two judicial organs, is in fact intended to preserve the case law of the Court, and not to substitute its own political decision” (Cremona 1994:517)



An assessment after 20 years of experience

- Both the EFTA Court and the national courts of the EEA EFTA States have consistently taken into account relevant rulings of the ECJ given after the date of signature of the EEA Agreement
 - At least as far as substantive EEA law is concerned, both the EFTA Court and the Supreme Court of Norway have *de facto* recognised the ECJ as the authoritative interpreter of the internal market *acquis*
- Most prominent example from the EFTA Court: Joined Cases E-9/07 and E-10/07 *L'Oréal*
 - The goal of homogeneity “calls for an interpretation of EEA law in line with new case law of the ECJ regardless of whether the EFTA Court has previously ruled on the question” (para. 29)
- Some prominent examples from the Supreme Court of Norway: Rt. 2000 p. 1811 *Finanger I*; Rt. 2004 p. 122 *Dental Depot*; Rt. 2010 p. 944/Rt. 2012 p. 219 *CHC*; Rt. 2013 p. 258 *STX*



An assessment after 20 years of experience (cont.)

- The EFTA Surveillance Authority and the governments of the EEA EFTA States have adapted to this reality
 - Awaiting and subsequently acknowledging the outcome of “test-cases” before the ECJ
 - A recent Norwegian example: the case concerning the use of personal watercrafts
 - Acknowledging judgments of the ECJ without questioning the EEA relevance of the reasoning behind them
 - A recent Norwegian example: The incorporation of the ECJ’s judgment in Case C-236/09 *Test-Achats*
 - The dispute settlement procedure under Article 111 EEA has never been used

Conclusion concerning incorporation: Yes

EEA EFTA States' participation in and before the ECJ

- No judges or Advocates General from the EEA EFTA States
- No influence on appointments to the ECJ
- No advocates for the legal culture and the political and constitutional traditions of the EEA EFTA States in the cabinets of the judges or the Advocates General or in the Court's research department
- But:
 - The EFTA Surveillance Authority and the EEA EFTA States may submit observations to the ECJ in preliminary ruling proceedings falling within the scope of EEA law (Art 23 of the Statute)
 - They may also intervene in cases where one of the fields of application of the EEA Agreement is concerned, but not in cases between EU Member States, between institutions of the Union or between EU Member States and institutions of the Union (Art 40 of the Statute)



Indirect participation through the EFTA Court?

- The case-law of the ECJ suggests that the views of the EFTA Court are taken into account
- The EFTA Court is certainly not an advocate for the governments of the EEA EFTA States
- Scarce evidence to support an understanding of the EFTA Court as an advocate for the legal culture and the political and constitutional traditions of the EEA EFTA States
- And even lesser evidence to suggest that the EFTA Court has passed on any such elements to the ECJ

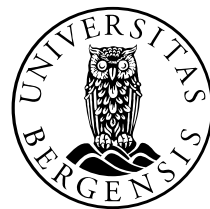
Conclusion concerning participation: Very limited



Does it matter?

- As a matter of principle: Yes
 - The judicial evolution of the internal market *acquis* to which the EEA EFTA States are subject takes place without notice of their legal culture and constitutional traditions
 - The national courts of the EEA EFTA States are cut off from the dialogue between the ECJ and the national courts of the EU Member States
- As a matter of fact: Perhaps
 - The EFTA Court cannot risk to be perceived as more attentive than the ECJ to the arguments of the governments and may therefore arguably end up as the opposite
 - The acknowledgment of the ECJ as the authoritative interpreter of the common EU EEA rules offers the highest national courts of the EEA EFTA States an excuse to keep cases to themselves, with possibly negative consequences for individuals and economic operators
 - There may be cases where the legal traditions of one or more of the EEA EFTA States could have contributed to the judicial evolution of EU law





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THE EEA VS. BILATERAL AGREEMENTS THE SWISS CASE

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Introduction

- Switzerland is affiliated with the EU through bilateral agreements
- What lessons can we learn from the Swiss perspective?
- What are the democratic implications of this kind of affiliation?

Introduction

- Switzerland – EU relations are in a very bad situation
- February 9, referendum, Swiss population accepted quotas on immigrants
- Not compatible with Bilateral agreement on free movement of people

Introduction

- Since 2005, EU pressures towards a solution closer to EEA benchmark
- Swiss government ready for concessions:
O'Sullivan – Rossier non paper

Substance (current)

- 1 120 bilateral agreements, covering several material cooperation
- 2 Main agreements: 1972 FTA + B.A. 1 + B.A. 2
- 3 B.A. 1 / B.A. 2 = access to Internal Market
- 4 No new important agreements since 2005 (stalemate / institutional question)

Substance (today)

- No full access to the Internal Market.
 - Financial services, Cassis of Dijon, Rules of competition
- Almost no horizontal and flanking policies.
 - Exception: financial solidarity

- 1. Free Movement of Persons.** Provides for the progressive opening of labour market leading to full free movement of persons between the EU and Switzerland.
- 2. Overland Transport.** Allows the free circulation of EU trucks of 28 tons and over on the Swiss territory, including in environmentally sensitive region such as the Alps.
- 3. Air Transport.** Sets the reciprocal opening of the market for air transport.
- 4. Public Procurement Markets.** Sets the reciprocal opening of the market for public procurement.
- 5. Participation in EU Research Programs.** Confirmed Switzerland's participation in key EU research programs, which otherwise might have been jeopardized.
- 6. Agriculture.** Reduces (but does not remove) customs duties and quotas for certain agricultural products.
- 7. Elimination of Technical Barriers to Trade.** Introduces mutual recognition of conformity assessments i.e., evaluations, inspections, certificates and authorizations. However, it does not include the adoption of the "Cassis de Dijon" principle.

The Bilateral Agreements II:

- 1. Taxation of savings.** Imposes a withholding tax on all income accruing from the EU residents' savings located in Swiss banks. Banking secrecy was maintained.
- 2. The Fight against Fraud.** Sets a particular framework for Swiss-EU fight against fraud in customs duties and indirect taxes.
- 3. Schengen/Dublin.** Schengen: checks on persons at Swiss-EU borders are abolished. Switzerland may still, however, maintain customs controls on merchandise. Dublin: seeking asylum in Switzerland if the request has already been made in another European state is prohibited.
- 4. Processed Agricultural Products.** Reduces customs duties on processed agricultural products.
- 5. Statistics.** Allows Switzerland to join Eurostat.
- 6. Pensions.** Exempts income tax on the pensions of retired EU officials living in Switzerland.
- 7. Environment.** Allows Switzerland to join the European Environment Agency.
- 8. MEDIA.** Allows Switzerland to Participate in MEDIA (EU program supporting the European audiovisual industry).
- 9. Education, Occupational Training.** Allows Switzerland to Participate in EU programs aiming at encouraging cross-border mobility of students, trainees and young people (Socrates, Leonardo da Vinci etc.).

Institutional aspects (today)

- 1 No general framework agreement. No legal link between the agreements (except “guillotine clause” B.A. 1).
- 2 Common institutions: small/sectoral joint bodies.
- 3 No automatic adoption of EU *acquis**.
- 4 No interpretation of CJEU*.
- 5 No mechanism of dispute settling.
- 6 No Swiss participation to decision shaping.

	European Economic Area (EEA/EFTA pillar)	Swiss B.A. (currently in force)	Swiss B.A. (O'Sullivan-Rossier non-paper)
Four freedoms, internal market			
Free movement of goods [tariff barriers]			unchanged
- Industrial goods	Yes	Yes (1972 FTA)	
- Agricultural products (unprocessed)	No	No	
[non-tariff barriers]			
- Agreement on Conformity assessment and acceptance of industrial prod. (ACAA)	Yes	Yes	
- Mutual recognition (implementation of the <i>Cassis de Dijon</i> principle)	Yes	No (but Switz. has unilaterally adopted the principle)	
Trade facilitations (simplification of border controls and formalities)	Yes	Yes	
Anti-fraud cooperation (customs irregularities and fraud)	Yes	Yes	
Access to public procurement markets	Yes	Yes	
Free movement of persons (FMP)	Yes	Yes	
Free movement of services (FMS)			
- Financial telecommunication and postal services	Yes	No	
- Air and land transport	Yes	Yes	
Free movement of capital (FMC)	Yes	Yes (in place before the B.A.)	
Access to public procurement markets	Yes	Yes	
Schengen/Dublin			
Participation to the Schengen Agreement and Dublin Regulation	No (Nor/Ice/Lie. participate on a bilateral basis though)	Yes	
Social and economic cohesion			
Participation to financial solidarity towards less affluent countries of the EU	Yes EEA/Norway Grants.	Yes <i>Ad hoc</i> contribution	
Customs Union			
Common external tariff	No	No	
Removal of border control on rules of origins	No	No	
Fiscal Policies			
VAT harmonization (and removal of border control on indirect taxation)	No	No	
Anti-fraud cooperation (indirect taxation)	Yes	Yes	
Taxation of savings	Yes	Yes	
Institutional link with the EU			
Participation to the EU decision making	No	No	
Participation to the EU decision shaping (policy shaping and comitology)	Yes	No (except in the S.D.*)	Yes
Acquis communautaire			
Adoption of the evolution of the relevant <i>acquis</i> (procedures)	Quasi-automatic	On a case by case basis (but quasi-automatic in A.T.** & S.D.)	Quasi-automatic ("dynamic")
Adoption of the evolution of the relevant <i>acquis</i> (extent)	Full in principle	Partial <i>de facto</i>	Full in principle
Adoption of the evolution of the relevant <i>acquis</i> (possibility of opt-out)	Yes Collective only (EEA/EFTA)	Yes <i>de facto</i>	Not mentioned (to be negotiated)
Surveillance and Jurisdiction			
Supervision by an independent surveillance authority (monitoring the transposition of the relevant <i>acquis</i> – may refer to CJEU)	Yes	No	No (but the Commission has a right of enquiry, may refer to CJEU)
Obligation to conform with CJEU's interpretation (appropriate implementation of the relevant <i>acquis</i>)	Yes	No (except in the A.T. & S.D. Bilateral Agreements)	Yes
Dispute settlements			
Mechanisms of dispute settlements (EU-EEA/EFTA and EU-Switzerland)	Political (multilateral neg. in the EEA Joint Committee)	Political (bilateral neg. in the different competent Joint Committees)	Political (as for the actual B.A. but neg. based on CJEU's interpretation)

*Schengen/Dublin Bilateral Agreement ; **Air Transport Bilateral Agreement

Scenarios

- Everything is now possible for Bilateral Agreements (BA)
- BA +++++ (Swiss legal scholars, Switzerland would join the EEA Court of Justice and EFTA Surveillance Authority without joining the EEA)
- BA +++ (EU mandate of negotiation, very close to EEA but on a bilateral basis)
- BA ++ (Compromise based on Rossier – O’Sullivan non-paper)
- BA + (Swiss mandate of negotiation, a few concessions but not too many)

Scenarios

- BA (keeping the situation as today, no change)
- BA – (EU accepts a few CH quotas on immigrants)
- BA – – (Less agreements after measures of reprisals taken by the EU because of the February referendum)
- BA – – – (Just the 1972 agreement)

Conclusion

- CH – EU relations are in total mess
- No prediction is possible
- CH can not be a model

Conclusion

- BA (today) = CH keeps more formal sovereignty than Norway in EEA
- Is the issue of sovereignty the same as the one of democracy?
- BA +++ or BA ++ do not make much difference with EEA in terms of democracy

Conclusion

- CH could give the impression to be more democratic than Norway, but it has more to do with direct democracy than BA or EEA
- Do not confuse the independent variable with the dependent variable
- The Swiss mess would have been the same if Switzerland had joined the EEA

The Expansion of the EU's Economic Community: Lessons for the Neighbours


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The EU' neighbours have increasingly developed '**a stake**' in the **internal market** since the 1990s:

- **European Economic Area:** "more structured partnership with common decision-making and administrative institutions" (Delors 1989)
- **Bilaterals** EU-Switzerland
- **Customs union** EU-Turkey (& San Marino, Andorra)
- **European Neighbourhood Policy:** "share everything but institutions" (Prodi 2002)

	Bilateral		Multilateral	
	Narrow	Broad	Narrow	Broad
Static (no pillar)	ENP 'hub-and-spoke' model	Swiss sectoral model		
Partly dynamic (no or partial pillar)	Turkish customs union Andorra & San Marino absorption model		[Energy Community]	
Dynamic (one or two pillars)				EEA two-pillar model

	Bilateral		Multilateral	
	Narrow	Broad	Narrow	Broad
Static	FUTURE ?			
Partly dynamic		<p>Turkish customs union 2.0?</p> <p>ENP 'hub-and-spoke 2.0' model?</p>		
Dynamic		<p>Swiss sectoral model with institutional umbrella?</p> <p style="text-align: center;"></p> <p>pillar solutions?</p>		<p>EEA two-pillar model 2.0?</p> <p>Andorra, San Marino & Monaco one-pillar framework association?</p>

Lessons

1. The existing models, other than the EEA, **reached their limits** because of
 - their growing sectoral scope
 - and lack of efficient arrangements for ensuring the necessary homogeneity.

2. The EU increasingly attempts to ensure **market homogeneity** by:

- concluding agreements with a **dynamic** adaptation to the *acquis*,
- its **uniform** interpretation and
- an **independent** surveillance and judicial enforcement.

3. This shift towards broader, more dynamic models raises the question of the **institutional pillar solution**:

- parallel (national or multilateral) institutions (i.e. two pillars),
- new joint institutions with EU or
- EU institutions?

4. This development creates a **dilemma** for both sides:

- **EU:** less legal and political fragmentation vs. participation of non-members
- **neighbours:** accept *acquis* to integrate the internal market vs. participatory deficit

5. The **EEA** – the 'blueprint' model – also **suffers from growing shortcomings:**

- discrepancy in relevant *acquis*,
- more adaptations,
- implementation delays,
- gaps in decision-shaping
- ...



THE EU'S NON-MEMBERS INCORPORATION WITHOUT REPRESENTATION

PANEL DEBATE



MORE ABOUT THE PROJECT

THE NORWEGIAN CONSTITUTION IN A CHANGING EUROPEAN CONTEXT (NORCONE)

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