

EEA: Another Side to Europe

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Abstract

This paper assesses the conceivable options for the UK to forge a mature, co-operative relationship with the European Union and other European countries. It does not propose that there is any solution – whether ‘off-the-shelf’ or bespoke – which may be considered perfect. It begins by setting out the recent history of European trade in context. It considers the EEA as it presently stands, the Swiss model (including ‘docking’), the potential of a bespoke FTA and the WTO. It takes as a working assumption that the two-year negotiation window provided for by Article 50 TEU is unlikely to be extended. It describes the European Economic Area, its rationale of trade, how it operates, as well as its institutions and principles. It notes that the EEA Agreement’s two pillar structure works well in Europe.

Subsequently, this paper focuses on the jurisdictional aspects for the UK having repealed s.3 of the European Communities Act 1972 and the end of the jurisdiction of the Court of Justice of the European Union over the United Kingdom. It evaluates the possible options available for the UK, concluding that an updated version of the EEA Agreement could be a natural home for the UK post Brexit: a solution which could also be in the interests of the EU, EEA/EFTA States and potentially Switzerland.

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Terminology

CETA – Comprehensive Economic and Trade Agreement

CPA – ‘Continental Partnership Agreement’ proposal made by the Bruegel think tank.

ECtHR – European Court of Human Rights

EFTA – European Free Trade Association

EEA – European Economic Area

EEA/EFTA States – Iceland, Liechtenstein and Norway

EFTA States - Iceland, Liechtenstein, Norway and Switzerland

ESA – EFTA Surveillance Authority

FTA – Free Trade Agreement

Introduction – brief historical background

EFTA was established in November 1959 by a Convention signed in Stockholm between Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. The conclusion of the free trade agreement was a response to the formation of the EEC through the Treaty of Rome in 1957. It was intended to prevent economic discrimination from the newly-created EEC and to create free trade between those countries in parallel to that within the EEC with a view to being able to conclude an agreement with the six EEC countries in the future.² In 1973, following the accession of the United Kingdom, Ireland, and Denmark to the EEC, a series of bilateral FTAs were created between the then EEC and the EFTA countries. These worked relatively well. Nevertheless, in 1984 at a meeting between the EFTA countries and the EC Member States and the European Commission in Luxembourg a programme for the future development of European economic cooperation was laid down.

This ‘Luxembourg Declaration’ formed the basis of discussions to create an ‘European Economic Space.’ This was intended to develop in parallel with developments within the EC so as to prevent new barriers to trade being created through the EC’s efforts to complete its internal market. By 1988 it was difficult to imagine how one could create a homogeneous EES if the solutions for the individual EFTA countries’ relationship to the EC were different. Indeed, it was considered that there was a risk of creating legal imbalance if only the EC and its Member States were subject to legal control when implementing and applying agreements with the EFTA States. Moreover, it became more and more difficult for both the EFTA countries, and for the Commission, to defend that the areas which both sides could agree were of common interest for cooperation were selected individually, while other fields were left completely aside i.e. a ‘cherry-picking policy’.³

On 16 September 1988 the multilateral Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was signed. The Contracting Parties were the EEC Member States, Poland, and the three EFTA States Iceland, Norway and Switzerland. The Lugano Convention is a parallel instrument to the Brussels Convention on the jurisdiction and the enforcement of judgments in civil and commercial matters of 1968.⁴

On 17 January 1989 the then President of the Commission, Jacques Delors, addressed the European Parliament.

‘Let us consider our close EFTA friends first. We have been travelling with them along the path opened up by the Luxembourg Declaration of 1984 on the strengthening of pragmatic cooperation. With each step we take the slope is getting steeper. We are coming up to the point where the climber wants to stop to get his breath, to check that he is going in the right direction and that he is properly equipped to go on. There are two options:

(i) we can stick to our present relations, essentially bilateral, with the ultimate aim of creating a free trade area encompassing the Community and EFTA;

(ii) or, alternatively, we can look for a new, more structured partnership with common decision-making and administrative institutions to make our activities

² Sven Norberg and Martin Johansson, The History of the EEA Agreement and the First Twenty Years of Its Existence, in: The Handbook of EEA Law (Baudenbacher Ed.), Springer (2016) pp. 8 and 9.

³ Ibid p. 21.

⁴ Carl Baudenbacher, Swiss Economic Law Facing the Challenges of International and European Law, Schweizerischer Juristentag 2012, Zeitschrift für Schweizerisches Recht, Helbing Lichtenhahn Verlag (2012), pp. 548-558.

more effective and to highlight the political dimension of our cooperation in the economic, social, financial and cultural spheres.’ (emphasis added)

The *Delors Declaration* was the starting-point of the negotiations leading to the signature of the EEA Agreement. The formal negotiations between the seven EFTA States and the EC on the creation of the European Economic Area began in Brussels on 20 June 1990. The timing of these negotiations should be seen against the background of the EC’s plan to complete the internal market by the symbolic date of 31 December 1992.

While the negotiations of the EEA Agreement were concluded on 22 October 1991 in Luxembourg, in August of that year, the Commission had asked the ECJ for its opinion on the compatibility with the EEC Treaty of the judicial mechanism planned in the EEA Agreement (the creation of an ‘EEA Court’). The ECJ’s Opinion 1/91 was delivered on 14 December 1991 and was based on the draft version of the Agreement dated 30 October 1991.⁵ The ECJ held *inter alia* that:

‘It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice pursuant to Article 164 of the EEC Treaty. This exclusive jurisdiction of the Court of Justice is confirmed by Article 219 of the EEC Treaty, under which Member States undertake not to submit a dispute concerning the interpretation or application of that treaty to any method of settlement other than those provided for in the Treaty. Article 87 of the ECSC Treaty embodies a provision to the same effect.

*Consequently, to confer that jurisdiction on the EEA Court is incompatible with Community law.*⁶

The ECJ delivered its ‘very severe Opinion’⁷ despite the fact that the ‘EEA Court’ would have been functionally integrated with the ECJ and when sitting in plenary session would have been composed of 5 ECJ Judges and 3 Judges nominated by the EFTA States.⁸ Opinion 1/91 has been justly heavily criticised.⁹

The renegotiations were concluded on 14 February 1992. On 25 February 1992, the Commission again asked the ECJ for an opinion in the newly agreed texts.¹⁰ In Opinion 1/92 delivered on 10 April 1992, the ECJ stated that the new texts were compatible with the EEC Treaty.¹¹ The finalised EEA Agreement was signed on 2 May 1992 in Oporto alongside the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (‘SCA’). It is the SCA which established the EFTA Surveillance Authority and the EFTA Court. The EEA Agreement entered into force on 1 January 1994.

It had been anticipated that the EFTA Court would have been composed of judges from seven EFTA States, but following a negative referendum on 6 December 1992 Switzerland did not

⁵ Opinion 1/91 ECR [1991] I-06079, at I-06084.

⁶ Opinion 1/91 ECR [1991] I-06079, points 35 and 36.

⁷ *Thérèse Blanchet, Risto Piipponen, and Maria Westman-Clément*, *The Agreement on the European Economic Area*, Clarendon Press (1994) p.3.

⁸ Article 95 of draft EEA Agreement as of 5pm 15 November 1991.

⁹ See for instance, *Sven Norberg*, *Justice in the European Economic Area – The Role of the EFTA Court*, in: *Judicial Protection in the European Economic Area* (EFTA Court Ed.) German Law Publishers (2012), pp.37-47, and *Carl Baudenbacher*, *The EFTA Court in Action: Five Lectures*, German Law Publishers (2010), pp.47-48.

¹⁰ i.e. on the amended Article 56 on the attribution of competition cases between the EC and EFTA pillars, the creation of an EFTA Court (Article 108(2)), the follow-up of case-law and exchange of information (Articles 105 and 106) and the dispute settlement mechanism (Article 111).

¹¹ Opinion 1/92 [1992] ECR I-252.

ratify the EEA Agreement. Liechtenstein which is in a customs union with Switzerland postponed ratification. Thus when the EFTA Court was founded in Geneva in January 1994, it was composed of one judge each nominated by Austria, Finland, Iceland, Norway and Sweden. However, the Five Members' Court was not to last as on 1 January 1995, Austria, Finland and Sweden acceded to the European Union, which had superseded the European Community upon the entry into force of the Maastricht Treaty on 1 November 1993. The Five Members Court ceased to exist in 30 June 1995. Liechtenstein's joined the EEA on the EFTA side on 1 May 1995. On 1 September 1996, the EFTA Court moved its seat from Geneva to Luxembourg where it remains to-date.

Switzerland was left in the cold. The Commission's Communication on "Future relations with Switzerland" of 1 October 1993 noted that Switzerland had requested the opening of negotiations with the view to the conclusion of new bilateral agreements in a wide range of areas. The Commission stated that negotiations should first be opened in the areas of air and road transport and of free movement of persons where Switzerland had not indicated that it wished to conclude bilateral agreements. Swiss requests should "be considered on a strict basis of mutual advantage and without undermining the EEA [...] Any agreement would need to deal satisfactorily with the implementation of the Community acquis and the need for Switzerland to accept the discipline involved."¹²

On 21 June 1999, Switzerland concluded seven treaties with the EU in the fields of free movement of persons, air transport, land transport, agricultural trade, mutual recognition of conformity assessment, public procurement and scientific and technological cooperation. They constituted the first package. The seven agreements were linked by way of a guillotine clause which stipulates that all the agreements would collectively cease to apply if one of them were to be terminated.¹³ By this, Switzerland was prevented from cherry picking by killing an unpopular agreement by way of referendum and keeping the more favourable ones.¹⁴ These agreements are essentially static (as opposed to dynamic) and can only be adapted to new EU law with Switzerland's consent.

On 26 October 2004 a further set of nine bilateral sectoral agreements (the "Second Package") between Switzerland and the EU was signed and entered into force between 2005 and 2009. These treaties go beyond the granting of pure market access and include agreements on the taxation of savings income and on the accession of Switzerland to the Schengen and Dublin systems concerning cooperation in the areas of justice, police, asylum and migration. Certain mechanisms for the adoption of EU law and for decision shaping, inspired by the EEA Agreement, were introduced. These agreements are not as static as the First Package and there is no guillotine clause.¹⁵

On 30 October 2007, the 1988 Lugano Convention was replaced by the "New Lugano Convention" whose contracting parties are the European Union, the three EFTA States Iceland, Norway and Switzerland, as well as Denmark.¹⁶ In the meantime, numerous bilateral

¹² COM (93) 486 final, page 1, and points 4, 11, and 13. *Carl Baudenbacher*, *Swiss Economic Law Facing the Challenges of International and European Law*, Schweizerischer Juristentag 2012, *Zeitschrift für Schweizerisches Recht*, Helbing Lichtenhahn Verlag (2012), pp.572-573.

¹³ *Carl Baudenbacher*, *Swiss Economic Law Facing the Challenges of International and European Law*, Schweizerischer Juristentag 2012, *Zeitschrift für Schweizerisches Recht*, Helbing Lichtenhahn Verlag (2012), p. 573. See, for example, Article 25 FMPA; also the Commission's Communication of 1 October 1993, pt. 12 and Annex VI.

¹⁴ *Carl Baudenbacher*, *Swiss Economic Law Facing the Challenges of International and European Law*, Schweizerischer Juristentag 2012, *Zeitschrift für Schweizerisches Recht*, Helbing Lichtenhahn Verlag (2012), p. 573.

¹⁵ *Ibid*, p. 579.

¹⁶ *Ibid*, p. 581.

arrangements have been made variously between the EEA/EFTA States individually and the EU.

Conceivable Options?

Following the referendum, there has been much talk of ‘soft Brexit’ and ‘hard Brexit’. Admittedly, the terms are unavoidably vague but they can be generally understood in the following terms. ‘Soft Brexit’ refers to the UK retaining access to the European Single Market. ‘Hard Brexit’ means that the UK will be without access to the European Single Market.

There are three possibilities that have been floated in terms of ‘Soft Brexit’: the EEA; the Swiss model (i.e. a sectoral approach) with an additional element of ‘docking’; and the Continental Partnership Agreement proposal made by the Brussels-based think tank Bruegel.¹⁷

If soft Brexit is not possible, there will be hard Brexit. This will involve either falling back onto the WTO rules or alternatively involving a bespoke FTA (Canada-style model - CETA) without institutions.

At present the UK is of course a member of the EU and a Contracting Party to the EEA Agreement.

Once Article 50 TEU is activated – whatever the outcome of the current litigation before the Supreme Court¹⁸ – the UK will have two years within which to negotiate and conclude a ‘withdrawal agreement’ with the EU before the EU Treaties shall cease to apply.¹⁹ This two-year period may be extended only by unanimous vote of the European Council in agreement with the UK.²⁰ Given the political mood, it is most unlikely that this two year period will be extended.

Whatever path Her Majesty’s Government seeks to pursue in terms of the UK’s future relationship with the EU, this time factor is a key element that must be considered, unless the WTO option is desired.

While a bespoke FTA agreement may be an attractive option from a UK perspective, it is most unlikely to be concluded within the two-period following from Article 50 TEU notification. CETA could be considered to be a template for such UK-EU FTA but several aspects must be borne in mind: (a) CETA took 7 years to negotiate; (b) is not as extensive as other options (c) is a mixed agreement (i.e. agreement and ratification must be done on both an EU and Member State level).

Using CETA as a template is of particular concern because of its nature as a mixed agreement. As is now well known, this requires each Member State to sign: e.g. Belgium requires its regional parliaments and linguistic communities to acquiesce.

The forthcoming Opinion 2/15 from the ECJ on the EU-Singapore Free Trade Agreement (which itself was used as a template for CETA) *may* resolve the ‘mixity’ question.²¹

¹⁷ Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff, Europe after Brexit: A proposal for a continental partnership, Bruegel, August 2016, available at <http://bruegel.org/wp-content/uploads/2016/08/EU-UK-20160829-final-1.pdf>.

¹⁸ *The Queen on the application of Gina Miller and Deir Tozetti Dos Santos v Secretary of State for Exiting the European Union*.

¹⁹ Article 50(3) TEU.

²⁰ Article 50(3) TEU.

²¹ The questions posed to the ECJ by the Commission are: -

“Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically:

Nevertheless, if an agreement between the UK and EU is not reached within the two-year period, it is certainly questionable whether the WTO *automatically* provides a fall-back position for the UK on the same terms as at present.²²

Single Market options: Learning from the Swiss experience

The EEA/EFTA States are part of the Single Market. Switzerland, while an EFTA State, has partial access to the Single Market on a sectoral basis as set out above through a series of bilateral agreements. No new agreement has been concluded between the EU and Switzerland since 2008.

The European Council Conclusions regarding the EFTA States Iceland, Liechtenstein, Norway and Switzerland of 2008, 2010, 2012, and 2014 are indicative and would also apply to the UK after Brexit. In these Council Conclusions, it is made clear to Switzerland that new market access agreements will only be reached on basis that a surveillance and court mechanism is included.

The 2010 Council's Conclusions, for example, state:

"In full respect of the Swiss sovereignty and choices, the Council has come to the conclusion that while the present system of bilateral agreements has worked well in the past, the key challenge for the coming years will be to go beyond that system, which has become complex and unwieldy to manage and has clearly reached its limits. As a consequence, horizontal issues related to the dynamic adaptation of agreements to the evolving acquis, the homogeneous interpretation of the agreements, an independent surveillance and judicial enforcement mechanisms and a dispute settlement mechanism need to be reflected in EU-Switzerland agreements.

*In addition to making the existing agreements more efficient and solving the outstanding problems in their implementation, the Council recognises that cooperation should be developed in certain areas of mutual interest. However, as regards agreements providing for Switzerland's participation in individual sectors of the internal market and policies of the EU (a status normally only granted to members of the European Economic Area (EEA)), the Council recalls its conclusions of 2008, that the requirement of a homogeneous and simultaneous application and interpretation of the evolving acquis - an indispensable prerequisite for a functioning internal market - has to be ensured as well as supervision, enforcement and conflict resolution mechanisms. In this context, the Council welcomes the setting-up of an informal Working Group of the Commission and Swiss authorities."*²³

The EU proposed to Switzerland that it either join the EEA on the EFTA side or 'dock' to the EFTA pillar's institutions (ESA and the EFTA Court). In either situation, Switzerland would have had the right to nominate its own ESA College Member (analogous to a European

— Which provisions of the agreement fall within the Union's exclusive competence?

— Which provisions of the agreement fall within the Union's shared competence? and

— Is there any provision of the agreement that falls within the exclusive competence of the Member States?"

²² An interim agreement may be required for the purposes of Article XXIV GATT 1994, for example. It is worthy of note that "[o]nce they (the British) leave, legally the EU schedules no longer applies to them ... The other WTO members arguably could say: 'I don't like it. We should change this, or we should change that' ... 'A lot will depend on the terms of separation in the negotiations between the UK and the EU. That may have a positive impact on how the other WTO members view this or not.'" Roberto Azevedo, Director-General of the World Trade Organization. 'WTO's Azevedo says Britain's WTO terms will depend on nature of EU divorce', Reuters, 21 October 2016, available at <http://www.reuters.com/article/us-britain-eu-wto-idUSKCN12L1QX?il=0>

²³ Council conclusions on EU relations with EFTA countries 3060th GENERAL AFFAIRS Council meeting, Brussels, 14 December 2010, paragraphs 48 and 49.

Commissioner) and EFTA Court Judge. The Swiss College Member and the Swiss EFTA Court Judge would sit in cases concerning the Swiss-EU bilateral agreements. This proposal would require the consent of Iceland, Liechtenstein, Norway and the EU and its Member States.

This ‘docking’ solution, while innovative, also demonstrates the regard with which ESA and the EFTA Court are held by the EU as in such a circumstance, the EU would be the side without a ‘Commissioner’ or judge. Remarkably, the EFTA Court would be a ‘foreign court’ for the EU.

However, the ‘docking’ solution was rejected by the Swiss Government. Switzerland made a counterproposal: it would accept the jurisdiction of the ECJ, but it contended the ECJ would give non-binding judgments vis-à-vis the Swiss-EU bilaterals. Following an ECJ judgment, the final resolution of the case would be through bilateral diplomacy.²⁴ Unsurprisingly, after 13 rounds of negotiations on this notion, no progress has been made.

Single Market options: no freestanding EEA membership

While the UK is a signatory to the EEA Agreement, it cannot rely upon the EEA Agreement if it is neither an EU Member State nor an EFTA State. This is due to the inherent ‘two pillar structure’ of the EEA as expressed, in this instance, in Article 128(1) EEA.²⁵ Article 128 EEA does not envisage a scenario of an EU Member State seeking to leave the EU, but remain in the EEA. As a consequence, there is no possibility of *free-standing* EEA membership.

Single Market options: EEA?

A precondition for EEA membership for the UK (outside of the EU) is EFTA membership. The following positions were expressed at the EFTA Ministerial Meeting of 27 June 2016 in Berne: ⁻²⁶

- The Icelandic Government considered that the members “should invite the UK to join EFTA.”
- Switzerland stated, “We are basically positive but we shouldn’t be too outspoken here, in order not to anger the European Union.”
- The Liechtensteiners were also cautious but a bit more positive.
- The Norwegians had reservations and the Norwegian politicians openly said they may lose the number one position in the EFTA pillar in case of British EEA membership, “and this is not in our interest”.

It is unlikely that this is the last word but rather the starting position from the Norwegian Government which softened its position over the summer.²⁷ For EEA membership on the EFTA side of the Agreement, the consent of Iceland, Liechtenstein and Norway and of the

²⁴ See generally, *Carl Baudenbacher*, Institutionalisation of the Sectoral Agreements Switzerland/EU: Fairy Tales and the Theatre of the Absurd, (2014) *European Law Reporter* 12, pp.324-330.

²⁵ “Any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council.”

²⁶ *Carl Baudenbacher*, After Brexit: Is the EEA an option for the United Kingdom?, The 42nd Annual Lecture of the Centre for European Law, King's College, London (revised version, 13th October 2016), forthcoming *European Law Reporter*.

²⁷ *Ibid.*

European Union would be needed.²⁸ From an EU perspective, this may be the most attractive solution from their perspective of its future relationship with the UK.

What does EFTA offer?

EFTA itself would basically enable the UK to profit from an already existing global FTA network.²⁹ For example the EFTA States have 27 FTAs covering 38 countries.³⁰ Furthermore, should not all EFTA States wish to, or be able to, conclude a joint FTA with a non-EEA country, then one EFTA country may conclude it on its own. For example, in 2009 Japan and Switzerland signed an Economic Partnership Agreement, and in 2013 both Iceland and Switzerland signed FTAs with China. Nevertheless, it must be reiterated that EFTA membership *alone* does not provide access to the Single Market.

The European Economic Area³¹

The Single Market encompasses the EU and the EFTA States (excluding Switzerland) through the EEA Agreement. The EEA Agreement ensures that the same Single Market law is interpreted consistently across the EEA. In EEA law this is termed ‘homogeneity.’ The EEA/EFTA States have not ‘pooled’ their sovereignty as EU Member States have. There is no ‘ever closer Union’. Instead, the EEA Agreement is an ‘enhanced free trade area’.³² The EEA is not a customs union which allows the EFTA States to sign their own FTAs.³³

The EEA Agreement seeks to achieve a homogeneous European Economic Area, based on common rules ‘*without requiring any Contracting Party to transfer legislative powers to any institution of the EEA [. . .]*’.³⁴ The purpose of the EEA is “[...] *so that the internal market is extended to the EFTA States*”³⁵ “[...] *for the benefit of businesses, workers and consumers*”.³⁶ It is an international treaty *sui generis* which contains a distinct legal order of its own. The depth of integration of the EEA Agreement is less far-reaching than under the EU Treaties, but its scope and objective go beyond what is usual for an agreement under public international law.³⁷

²⁸ The example of Austria, Finland and Sweden departing EFTA to join the European Union while not reapplying to join the EEA may be illustrative but is not fully analogous.

²⁹ Article 56(3) EFTA Convention. In addition, see for example, Article 70 EFTA-Singapore Free Trade Agreement 2003.

³⁰ Albania, Bosnia and Herzegovina, Canada, Central American States (Costa Rica, Guatemala and Panama), Chile, Colombia, Egypt, Georgia, Gulf Cooperation Council (GCC), Hong Kong, China, Israel, Jordan, Korea, Republic of, Lebanon, Macedonia, Mexico, Montenegro, Morocco, Palestinian Authority, Peru, Philippines, Serbia, Singapore, Southern African Customs Union (SACU), Tunisia, Turkey, and Ukraine (<http://www.efta.int/free-trade/free-trade-agreements> accessed 6 July 2016). A short description of the main subjects addressed in EFTA free trade agreements may be found at http://www.efta.int/sites/default/files/documents/free-trade/EFTA_website_-_Free_trade.pdf.

³¹ This part is based on the author’s series of posts on the Monckton Chambers Brexit Blog in July 2016.

³² Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 59.

³³ A ‘customs union’ is defined in Article XXIV:8(a) of the GATT 1994. In essence it requires that duties and other restrictive regulations of commerce be eliminated with respect to substantially all the trade between those countries and that at the same time substantially the same duties and other regulations of commerce be applied by each country in the customs union towards the rest of the world.

³⁴ Recital to Protocol 35 EEA. See *Páll Hreinsson*, General Principles, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.383.

³⁵ Case E-1/03 *ESA v. Iceland* [2003] EFTA Ct. Rep. 143, paragraph 27.

³⁶ Case E-17/15 *Ferskar kjötvörur ehf. v Iceland (Raw Meat)*, judgment of 1 February 2016, not yet reported, paragraph 41.

³⁷ Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTA Ct. Rep. 95, paragraph 59.

The strength of the EEA is its two pillar structure: the Agreement is held aloft co-dependently by its EU-side (the EU Member States, the EU institutions etc.) and EFTA-side (the EEA/EFTA States and their EFTA institutions (ESA and the EFTA Court)).

The EEA single market can only function in an undistorted way if there is a regulatory level playing field for individuals and economic operators. For EU law practitioners the EEA Agreement is both extremely familiar yet distinct. It is the same, but fundamentally different.

What does the EEA Agreement cover?

The EEA Agreement provides for the inclusion of EU legislation covering the Four Freedoms — the free movement of goods,³⁸ services, persons and capital — as well as competition law, State aid, public procurement and the major part of economic law, including Intellectual Property law, throughout the 31 EEA States.

In addition, it covers cooperation in other important areas, such as research and development, education, social policy, the environment, consumer protection, tourism and culture. These are collectively known as “flanking and horizontal” policies.

That being said, the EEA Agreement is not completely identical to the EU Treaties as agriculture, fisheries and customs provisions are intentionally excluded.³⁹ Furthermore, EU developments that go beyond the core of the internal market (e.g. Monetary Union (EMU) or the Common Foreign and Security Policy) are also excluded.⁴⁰ Further areas which are not included are procedure and EU rules governing the allocation of jurisdiction and recognition and enforcement and judgments.⁴¹

That is not to say that EEA/EFTA States are prevented from being party to what one might imagine to be purely EU arrangements. For instance, each EEA/EFTA State (but also Switzerland) has chosen to be associated to the Schengen Agreement.⁴² Likewise, the three EEA/EFTA States have chosen to be Erasmus+ ‘programme countries’ in exactly the same way as EU Member States, allowing their students to study at university in another European country.⁴³ Norway and Iceland, for instance, also take part in the ‘Horizon 2020’, the EU’s research and innovation programme.⁴⁴ Norway has approximately 100 bilateral agreements with the European Union.

³⁸ Article 8(3) EEA provides that free movement applies to certain categories of goods only: -

“Unless otherwise specified, the provisions of this Agreement shall apply only to:

(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;

(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.”

See *Sven Norberg*, *The European Economic Area*, in: *Oliver on Free Movement of Goods in the European Union* (Oliver (Ed.)) Fifth Edition, Hart Publishing (2010), pages 492 to 495, and *Peter-Christian Müller-Graff*, *Free Movement of Goods*, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016).

³⁹ Although the EEA Agreement contains provisions on various aspects of trade in agricultural and fish products.

⁴⁰ Other policies excluded are, in particular: the EU’s Common Foreign Trade Policy; and Justice and Home Affairs (although all four EFTA countries are part of the Schengen area).

⁴¹ i.e. the Brussels I and II regimes as well as the Rome Regulations.

⁴² http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm accessed 28 June 2016.

⁴³ http://ec.europa.eu/programmes/erasmus-plus/about_en#tab-1-1 accessed 28 June 2016.

⁴⁴ http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/3cp/h2020-hi-list-ac_en.pdf accessed 28 June 2016.

The Structure of the EEA

The EEA's structure is straightforward. The EEA Agreement covers all 31 EEA States. That level playing field is safeguarded by separate institutions: in the EU pillar by the European Commission and the ECJ; and in the EFTA pillar by the EFTA Surveillance Authority and EFTA Court.

The EEA Agreement, as noted above, did not found the EFTA Court or the EFTA Surveillance Authority. However, it does contain an obligation for the EFTA States to enter into a separate agreement to create such institutions.⁴⁵ The EFTA States fulfilled this obligation through the Agreement on the Establishment of a Surveillance Authority and a Court of Justice ("SCA"). The SCA founded the EFTA Court and the EFTA Surveillance Authority ("ESA") using, as an initial template, the 1994 version of the CJEU and the Commission, respectively.

The most important joint EU-EFTA body is the EEA Joint Committee which is the vehicle through which secondary EU law is introduced into the EFTA pillar.⁴⁶

The EEA Joint Committee - its role in the introduction of new legislation

The EEA Joint Committee ("EEA JC") is responsible for the management of the EEA Agreement and typically meets six to eight times a year. It is a forum in which views are exchanged and decisions are taken by consensus to incorporate EU legislation into the EEA Agreement. Following the Lisbon Treaty, the EEA JC is comprised of the ambassadors of the EEA/EFTA States and representatives of the EU's European External Action Service.⁴⁷ Within the EEA JC, the EEA/EFTA States 'speak with one voice.'⁴⁸

Four subcommittees assist the Joint Committee (on the free movement of goods; the free movement of capital and services including company law; the free movement of persons; and horizontal and flanking policies), with the assistance of numerous expert and working groups.⁴⁹

The prerequisite for an EU act to be considered for incorporation into the EEA Agreement, i.e. into one of its annexes, is normally whether it is seen as 'EEA relevant'.⁵⁰ There are two main considerations as to why an EU act is likely to be EEA relevant. First, it may amend or repeal an act already referred to in one of the annexes or protocols to the EEA Agreement. This does not mean, however, that certain provisions of the act may need amendment as they may be outside of the scope of the Agreement itself.⁵¹ If an act does not amend another act already referred to in the EEA Agreement, an analysis of the act is required in light of the objectives of the EEA and the means to achieve these objectives.⁵²

Whenever an EEA-relevant legal act is amended, or a new one is adopted by the EU, a corresponding amendment needs to be made to the relevant Annex of the EEA Agreement.⁵³ This is essential to maintain the principle of homogeneity of the EEA. The amendment to the

⁴⁵ Articles 108 and 109 EEA.

⁴⁶ See generally, *Georges Baur*, Decision-Making Procedure and Implementation of New Law, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016).

⁴⁷ <http://www.efta.int/eea/eea-institutions/eea-joint-committee> accessed 29th June 2016.

⁴⁸ Article 93(2) EEA.

⁴⁹ <http://www.efta.int/eea/eea-institutions/eea-joint-committee> accessed 29th June 2016.

⁵⁰ *Georges Baur*, Decision-Making Procedure and Implementation of New Law, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016), p. 53.

⁵¹ *Ibid.*

⁵² *Ibid.*, p. 54.

⁵³ Article 98 EEA.

EEA Agreement should be taken as closely as possible to the adopted legislation on the EU side, with a view to permitting simultaneous application across the EEA.⁵⁴

The preparatory work for EEA Joint Decisions is the responsibility of the EFTA subcommittees and working groups in which representatives of the EEA/EFTA States are present. The EEA JC makes the decision to incorporate Joint Decisions into the EEA Agreement. A major difference in comparison with the EU is that the EEA does not provide for the transfer of legislative powers of the Contracting Parties to an EEA institution.⁵⁵ The EEA Joint Committee therefore plays a key role in the EEA decision-making procedure.

EFTA Surveillance Authority

ESA's main tasks are to ensure that the EEA/EFTA States live up to their obligations under the EEA Agreement by fully, correctly and timely transposing the common Internal Market rules (the *acquis communautaire*) into their domestic legal order and by applying these rules correctly. ESA's monitoring and enforcement role and procedures vis-à-vis the EEA/EFTA States broadly resemble those of the Commission, with which it cooperates.⁵⁶

ESA⁵⁷ formally consists of, and is governed by, a College of three Members,⁵⁸ one put forward by each of the EEA/EFTA States and appointed by common accord for a term of 4 years.⁵⁹ Amongst them, the EEA/EFTA States agree on a President for a term of 2 years.⁶⁰ The current President is Sven Erik Svedman.

ESA is divided administratively into four departments: the Internal Market Affairs Directorate ('IMA') and the Competition and State Aid Directorate ('CSA') are complemented by the Department for Legal and Executive Affairs ('LEA') and assisted by the Department for Administration ('ADM').⁶¹

ESA's internal working language is English and all communications with the EEA/EFTA States are conducted in English.

The EFTA Court

The EFTA Court is an independent judicial body, established under the SCA to ensure the judicial control of the EEA Agreement in the EEA/EFTA States. As noted above, a 1994 version of the ECJ was used as an initial template for the EFTA Court.⁶² As a consequence, the EFTA Court uses essentially the same interpretative toolkit as the ECJ.⁶³

In order to ensure that, from the outset, the Single Market playing field is perfectly flat, the EFTA Court is bound to follow relevant pre-EEA Agreement ECJ case-law (i.e. pre 2 May 1992).⁶⁴ The EFTA Court is furthermore required to pay "due account" to all subsequent

⁵⁴ Article 102 EEA.

⁵⁵ 16th recital, EEA Agreement.

⁵⁶ *Frank Büchel and Xavier Lewis*, The EFTA Surveillance Authority, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.117.

⁵⁷ See generally, *Frank Büchel and Xavier Lewis*, The EFTA Surveillance Authority, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016).

⁵⁸ Article 7 SCA.

⁵⁹ Article 9(2) SCA.

⁶⁰ Article 12 SCA.

⁶¹ Article 2 EFTA Surveillance Authority Rules of Procedure ("ESA RoP").

⁶² It is for this reason that there is no Article 255 TFEU type panel to assess nominee judges.

⁶³ *Eleanor Sharpston and Michael-James Clifton*, The Two EEA Courts – Unequal Balance or Fruitful Partnership, in: *Judicial Protection in the European Economic Area*, (EFTA Court Ed.) German Law Publishers (2012) pp.170-186 at p.174.

⁶⁴ Article 3(1) SCA.

relevant ECJ jurisprudence.⁶⁵ In practice, the EFTA Court pays equal regard to post 1992 ECJ case-law. These provisions are pure common-sense. It would prove impossible to ensure an equal playing field for individuals and economic operators across the EU/EFTA divide if the same law was not interpreted in the same way. Nevertheless, it is important to emphasise that case law such as *Costa v ENEL* and *Van Gend en Loos*, on the primacy and direct effect of EU law, do not apply.⁶⁶ Moreover, the EFTA Court has recently emphasised its independence.⁶⁷ This pragmatism is the common thread of the EEA Agreement and defines its fundamental principles.⁶⁸ With regard to some major issues, the EFTA Court has found it appropriate to go its own way:⁶⁹ Examples include whether a body constitutes a court or tribunal entitled to make a reference; here the EFTA Court has more and more used a functional instead of an institutional approach.⁷⁰ With regard to the question of whether an in-house lawyer enjoys rights of audience, the Court has, contrary to the ECJ, opted for a case-by-case approach in the assessment of whether such a representative is sufficiently independent.⁷¹

Importantly, experience shows that the ECJ and its Advocates General, the General Court, but also national courts of EU Member States, pay due account to the case law of the EFTA Court.⁷² Indeed, the EFTA Court typically faces novel legal problems requiring it to go first.⁷³ For example, the Court of Appeal referred a case to the ECJ on the basis of the EFTA Court's findings in *Paranova v Merck*.⁷⁴ The ECJ, following both the Court of Appeal's suggestion and the Opinion of the Advocate General Eleanor Sharpston, subsequently adopted the EFTA Court's approach.⁷⁵

The EFTA Court hears two main types of cases: references for an advisory opinion and direct actions. Advisory opinions are almost identical to preliminary rulings of the ECJ.⁷⁶ However,

⁶⁵ Article 3(2) SCA.

⁶⁶ For further details see below under Principles of EEA Law.

⁶⁷ Case E-28/15 *Yankuba Jabbi*, judgment of 26 July 2016, not yet reported, paragraph 71.

⁶⁸ *Michael-James Clifton*, *The Other Side of the Street: the EFTA Court's Role in the EEA*, *European Law Reporter* (2014), 7-8, 216-219, at p.217.

⁶⁹ Another scenario would be where scientific understanding for instance has evolved e.g. the EFTA Court's ground-breaking development of the 'precautionary principle' in food law in E-3/00 *ESA v. Norway (Kellogg's)* [2000-2001] EFTA Ct. Rep. 73; see *Alberto Alemanno*, *The Precautionary Principle*, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) pp.839 to 850.

⁷⁰ Case E-23/13 *Hellenic Capital Market Commission* [2014] EFTA Ct. Rep. 88, paragraphs 30 *et seq.* *Carl Baudenbacher*, *The Relationship Between the EFTA Court and the Court of Justice of the European Union*, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.184.

⁷¹ Case E-8/13 *Abelia* [2014] EFTA Ct. Rep. 638, paragraph 46; see *Carl Baudenbacher and Philipp Speitler* *Der Syndikus der Gegenwart – Interessensvertreter oder Anwalt des Rechts?* *NJW* (2015) 17:1211–1214, pp. 211 *et seq.* *Carl Baudenbacher*, *The Relationship Between the EFTA Court and the Court of Justice of the European Union*, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.184.

⁷² By 2014, the ECJ had referred to EFTA Court judgment in approximately 100 cases: *Michael-James Clifton*, *The Other Side of the Street: the EFTA Court's Role in the EEA*, *European Law Reporter* (2014), 7-8, 216-219, at p.218.

⁷³ *Carl Baudenbacher*, *The Relationship Between the EFTA Court and the Court of Justice of the European Union*, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) pp.187 to 190.

⁷⁴ Case C-348/04 *Böhringer II* ECLI:EU:C:2007:249, paragraph 13.

⁷⁵ Opinion of Advocate General Sharpston of 9 October 2008 in Case C-276/05 *The Wellcome Foundation* [2008] ECR I-10479, points 33 to 36.

⁷⁶ While this is perhaps a little simplistic, "[f]or most intents and purposes Advisory Opinions are therefore analogous to the ECJ's judgments in references for a preliminary ruling." *Eleanor Sharpston and Michael-James Clifton*, *The Two EEA Courts – Unequal Balance or Fruitful Partnership*, in: *Judicial Protection in the European Economic Area*, (EFTA Court Ed.) German Law Publishers (2012) 170-186 at 174. For a more detailed analysis, see *Skuli Magnusson*, *On the Authority of Advisory Opinions: Reflections on the Functions and Normativity of Advisory Opinions of the EFTA Court*, *Europarättslig tidskrift* (2010) Vol 3, pp. 542 to 546, and more briefly, *Carl Baudenbacher*, *Human Rights, Democracy and the Rule of Law in: Liber amicorum Luzius Wildhaber*, Baden-Baden (2007), p.80.

they leave the national courts more leeway. All direct actions brought before the EFTA Court are brought upon the basis of an infringement of the EEA Agreement itself or of the SCA (i.e. actions for annulment, or for failure to act, of ESA decisions).

Just as at the ECJ, there are no dissenting opinions in EFTA Court judgments. The single judgment is the view of the bench as a whole and its deliberations, as well as the vote, remain secret. The EFTA Court is currently composed of three judges – one nominated by each EEA/EFTA State –, each having his own *cabinet* of Legal Secretaries (*référéndaires*)⁷⁷ as well as administrative staff, and the registry headed by the Registrar. The current President of the Court is Carl Baudenbacher; a Swiss citizen nominated as Liechtenstein's member of the bench. If a Judge is unable to sit in a particular case, he or she is replaced by one of two *ad hoc* judges from that country.

While there are many similarities between the ECJ and EFTA Court there are some notable differences. Unlike the ECJ, the EFTA Court's working language is English.⁷⁸ Nor does the EFTA Court have Advocates-General. The EFTA Court is also happy to cite ECtHR decisions directly⁷⁹ and even to cite academic literature - notably the concept in economics of moral hazard as formulated by Joseph E. Stiglitz, the Nobel Laureate.⁸⁰

Following the receipt of all the written submissions, a Report for the Hearing is prepared.⁸¹ The Report contains the relevant law, the facts and a summary of the arguments of the parties. The parties may comment on the Report before it is published – thus providing a healthy dose of transparency.⁸² In advisory opinion cases, the necessary translation of the request from the national court into English and of the judgment back into the language of the request is outsourced.

A preliminary reference decision from the EFTA Court takes 8 months on average from the date of the request before judgment is rendered.⁸³ Direct action judgments – including competition and State aid law cases – take 9 months on average.⁸⁴

Principles of EEA Law

The EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own.⁸⁵

Two fundamental principles of EEA law are homogeneity and reciprocity.⁸⁶ Although EU and EEA law constitute two separate legal orders, they must essentially be identical in substance

⁷⁷ Michael-James Clifton and Pekka Pohjankoski, *Référéndaires or Legal Secretaries at the Court of Justice of the EU and the EFTA Court: Their Role in the Administration of European Justice*, forthcoming European Law Reporter.

⁷⁸ See Articles 25 and 27 EFTA Court Rules of Procedure.

⁷⁹ See *inter alia* Case E-14/15 *Holship Norge AS v Norsk Transportarbeiderforbund*, judgment of 19 April 2016, not yet reported, paragraph 123, Case E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 18, paragraph 23, and Case E-15/10 *EFTA Surveillance Authority v Posten Norge AS* [2012] EFTA Ct. Rep. 246, paragraphs 88 to 91. Compared to the EFTA Court, the ECJ is more hesitant in citing the case-law of the European Court of Human Rights, although it does still sometimes refer to it directly (for example, Case C-398/12 *M* EU:C:2014:1057, paragraphs 39 and 40).

⁸⁰ Case E-16/11 *EFTA Surveillance Authority v Iceland* ("*Icesave I*") [2013] EFTA Ct. Rep. 4, paragraph 167.

⁸¹ The ECJ discontinued this practice in 2012.

⁸² For the transparency perspective, see *Alberto Alemanno and Oana Stefan*, *Openness at the Court of Justice of the European Union: Toppling a Taboo*, *Common Market Law Review* (2014), 51(1), 97 (130).

⁸³ *Ibid.*

⁸⁴ Michael-James Clifton, *The Other Side of the Street: the EFTA Court's Role in the EEA*, *European Law Reporter* (2014), 7-8, 216-219, at p.218.

⁸⁵ Case E-9/97 *Sveinbjörnsdóttir v Iceland* [1998] EFTA Ct. Rep. 95, paragraph 59.

⁸⁶ Case E-12/13 *EFTA Surveillance Authority v Iceland* [2014] EFTA Ct. Rep. 58, paragraph 68.

and they must develop in a homogeneous way. ‘The EEA Agreement has linked the markets of the EEA/EFTA States to the single market of the European Union.’⁸⁷ The EEA Single Market can only function in an undistorted manner if there is a level playing field for the market operators, producers, workers, consumers, dealers, and investors. Competition must, as a matter of principle, be led by economic and not regulatory advantage.⁸⁸

It must be emphasised that homogeneity is not something which can be achieved in every single case; a process-oriented approach is necessary.⁸⁹ However, law is not an exact science.⁹⁰ Even if the ECJ has gone first, there may be situations where the Court reaches the conclusion that it must go its own way. There are several categories of examples. Firstly, if the relevant ECJ case-law is old and there are new circumstances or there is new scientific evidence, the Court may come to the conclusion that it is not appropriate to follow it.⁹¹ Secondly, where there is relevant case-law from the European Court of Human Rights, the Court does not adopt the case-law of the ECtHR via the mouth of the ECJ, but directly looks to Strasbourg. This was done, for instance, in the landmark Case E-15/10 *Norway Post*, where the Court took a different position from the ECJ that in competition cases ‘when imposing fines for infringement of the competition rules, ESA cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.’⁹² Finally, the EFTA Court is now a mature institution and may take its own direction: in *Matja Kumba*, for instance, in particular circumstances, the EFTA Court held that a working week of 80 hours did not breach the Working Time Directive.⁹³

Reciprocity means that when it comes to remedies, EU operators must basically have the same rights in the EFTA pillar as EFTA operators enjoy in the EU pillar.⁹⁴

While the EEA Agreement is of a *sui generis* nature, there is almost the same, but not quite the same approach to some of the fundamental principles. Instead of primacy, direct effect and State liability in the EU, there is quasi-primacy, and quasi-direct effect.⁹⁵ This particular difference finds its foundations in Protocol 35 EEA and Article 7 EEA.

The Sole Article of Protocol 35 EEA reads “*For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.*”

Article 7 EEA reads “*Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*

⁸⁷ Case E-10/14 *Enes Deveci* [2014] EFTA Ct. Rep. 1364, paragraph 64.

⁸⁸ See generally, *Carl Baudenbacher*, The EFTA Court: Structures and Tasks, in: The Handbook of EEA Law (Baudenbacher Ed.), Springer (2016) p.145. See also *Páll Hreinsson*, General Principles, in the same publication.

⁸⁹ *Carl Baudenbacher*, The EFTA Court: Structures and Tasks, in: The Handbook of EEA Law (Baudenbacher Ed.), Springer (2016) p.145.

⁹⁰ *Ibid* pp. 184-188.

⁹¹ See for instance E-3/00 *ESA v. Norway* [2000-2001] EFTA Ct. Rep. 73.

⁹² Case E-15/10 *Posten Norge v. ESA*, [2012] EFTA Ct. Rep. 246, paragraph 100.

⁹³ See for example, Case E-5/15 *Matja Kumba* [2015] EFTA Ct. Rep. 674

⁹⁴ From the ECJ see: Case C-452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I-9743, paragraph 28; and from the EFTA Court see: Case E-18/11 *Irish Bank Resolution Corporation v. Kaupthing Bank* [2012] EFTA Ct. Rep. 592, paragraphs 58 and 122.

⁹⁵ See generally, *Páll Hreinsson*, General Principles, in: The Handbook of EEA Law (Baudenbacher Ed.), Springer (2016).

(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.”

Since legislative power was not to be transferred by the EEA Agreement from the States that adhered to the dualistic principles (at the time Finland, Iceland, Norway and Sweden), the principles of ‘direct effect’ and ‘primacy’ of EU law were not made a part of the EEA Agreement (i.e. *Costa v ENEL* and *Van Gend en Loos*, on the primacy and direct effect of EU law, do not apply). Instead the drafters sought other solutions, which produce results similar to those under EU law.⁹⁶ Consequently, State liability in the EFTA pillar is arguably stricter than its EU law equivalent (in order to balance out the inherent weaknesses of quasi-primacy, and quasi-direct effect).⁹⁷

Because the EFTA pillar is smaller and the EFTA Court is faster than the ECJ, the EFTA Court typically is faced with scenarios in which there is no relevant ECJ case law. The EFTA Court has made use of this “first-mover advantage” and burden, and is often cited by the ECJ in its own jurisprudence. Indeed, then President of the Court of Justice Vassilios Skouris wrote in 2014:

‘It is safe to say, with confidence, that expectations of reciprocity have largely been fulfilled. The courts in both EEA pillars have made momentous determinations to safeguard a homogenous development of case-law. From its very beginning, the EFTA Court highlighted the importance of the objective of the Contracting Parties to create a dynamic and homogeneously regulated EEA. The long lasting dialogue between the EFTA Court and the CJEU has allowed the flow of information in both directions. Ignoring EFTA Court precedents would simply be incompatible with the overriding objective of the EEA Agreement which is homogeneity.’⁹⁸

Considering the Options

Each option available to the UK in seeking a mature, cooperative relationship⁹⁹ with the European Union in the future each has its own difficulties and problems.

Bespoke FTA

Depending on the view of the ECJ in Opinion 2/15, the bespoke FTA concept, presumably based on CETA, may be more or less difficult on the legal and political planes to achieve. Nevertheless, it is highly likely to take more than two years to negotiate and ratify. This would mean that there would be a gap between being an EU Member State and having the bespoke FTA, unless a transitional arrangement is reached. Nevertheless, the nature of such a transitional arrangement leading to a UK-EU FTA is unlikely to be attractive for the UK. Business operators would lose access to European justice.

⁹⁶ Ibid, page 388.

⁹⁷ *Skuli Magnusson and Ólafur Ísberg Hannesson*, State Liability in EEA Law: Towards Parallelism or Homogeneity?, E.L. Rev (2013) 38(2), pages 167-186.

⁹⁸ *Vassilios Skouris*, The Role of the Court of Justice of the European Union (CJEU) in the Development of the EEA Single Market: Advancement through Collaboration between the EFTA Court and the CJEU. In: *The EEA and the EFTA Court. Decentred Integration.* (EFTA Court (ed)) (2014) Hart Publishing, Oxford and Portland, p 3–12.

⁹⁹ Prime Minister's press statement of 21 October 2016, European Council October 2016: available at <https://www.gov.uk/government/speeches/european-council-october-2016-prime-ministers-press-statement>.

Sectoral Agreements

An arrangement with separate agreements between the EU and UK on different sectors would possibly be achievable, but would necessarily require a non-national supervisory system and judicial forum given the Swiss experience. ‘Docking’ these sectoral agreements to the EFTA institutions with the UK having its own College Member and Judge taking part in UK cases, would be in line with the EU Council’s conclusions as regards Switzerland.

It has been suggested that the UK may prefer that any disputes be adjudicated through arbitration rather than before a court.¹⁰⁰ Whether arbitration would be acceptable to the EU is more than doubtful. Article 111(4) EEA states that no question of interpretation of the provisions of EEA law that are identical in substance to provisions of EU law may be dealt with in arbitration procedures. But even if the EU would agree, arbitration on such a scale would be extremely expensive.¹⁰¹ The experience of the EEA/EFTA States has been that it is of great advantage to have an ‘own court’.

It is plausible that in a sectoral-based arrangement the EU would insist on having free movement of persons as one of the first agreements as a *sine qua non*, as it did with Switzerland. This is likely to be politically unpalatable to the UK, and could lead to deadlock and no agreement being reached within the 2-year time frame. The current Danish negotiations to obtain partial access to Europol through a parallel agreement following the negative referendum result of 3 December 2015 (against adopting the opt-in arrangement on 22 legislative acts related to cross-border crime) may prove illustrative.

EEA+?

While there are certain aspects which could, and perhaps should, be modified in the medium term – for the benefit of all EEA members – the EEA provides a workable framework for the UK. There is no ‘ever closer Union’. There would be no judicial oversight by the ECJ once s.3 European Communities Act 1972 is repealed. The UK could join the existing FTAs EFTA States have signed¹⁰² and would have the freedom to make its own FTAs and set its own trade policy as the EEA is not a customs union.

This option would keep the UK in the Single Market and would potentially resolve certain difficulties with the devolved administrations. Critically, ESA and the EFTA Court work in English. This is an aspect which should not be underestimated as regards the jurisprudence handed down. President Baudenbacher has recently made reference to the Austrian writer Karl Kraus who famously wrote: “Language is the mother of thought, not its handmaiden.”¹⁰³

The EFTA Court is mature and independent and is less jurisdictionally ‘grasping’ than the ECJ. The purpose of EFTA and the EEA is to further the friendly relations and trade between sovereign member countries. The EFTA Court has characterised its relationship with national supreme courts as being ‘*more partner like*’.¹⁰⁴ This is a natural consequence of both the legal framework of the EEA and SCA, but also of the Court’s ethos. This ethos is borne out in the Court’s jurisprudence: assessing the economics in cases (for example in E-15/10 *Norway Post*); applying the economic concept of moral hazard in E-16/11 *Icesave*; to expecting consumers to

¹⁰⁰ For a comparative analysis of different forms of international adjudication see: *Carl Baudenbacher and Michael-James Clifton*, Courts of Regional Economic and Political Integration Agreements, in *The Oxford Handbook of International Adjudication*, Oxford University Press, 2014, pp 251 to 277.

¹⁰¹ The EFTA Court’s budget by contrast is currently 5 million Euro per year.

¹⁰² Article 56(3) EFTA Convention.

¹⁰³ *Carl Baudenbacher*, After Brexit: Is the EEA an option for the United Kingdom?, The 42nd Annual Lecture of the Centre for European Law, King’s College, London (revised version, 13th October 2016), forthcoming *European Law Reporter*.

¹⁰⁴ E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 57.

be able to download or print out a document from the website of a financial services provider in the Internet age (E-4/09 *Inconsult*); and applying a flexible interpretation of the Working Time Directive in Case E-5/15 *Matja Kumba*.

International Civil Procedure

An important aspect that is sometimes overlooked is on the rules governing the allocation of jurisdiction and recognition and enforcement of judgments (i.e. the Brussels I regime¹⁰⁵). This is not provided for in the EEA Agreement. Instead, the UK could accede to the Lugano II Convention which applies between the EU, Switzerland, Norway and Iceland.¹⁰⁶ Lugano II is specifically open for accession by new EFTA States.¹⁰⁷ It corresponds to the former Brussels I Regulation, but could be revised to bring it into line with Brussels I *bis* and *inter alia* remove the effect of the ECJ's judgment in *Gasser*.¹⁰⁸

Free Movement of Persons

The EEA Agreement, as it currently stands, contains the free movement of persons which applies, to a similar extent, as in the EU, although the concept of 'Union Citizenship' has no equivalence for EFTA nationals.¹⁰⁹ The Bruegel think tank's 'Continental Partnership' paper of 1 September 2016 discusses whether the EU should make a concession to the UK on this point and broke a taboo.¹¹⁰ The Bruegel authors contend that unlike freedoms of goods, services and capital, free movement of persons is not economically but politically determined.¹¹¹ It is worthy of note that one of the five authors is *Norbert Röttgen*, the former German Federal Minister and now Chairman of the Bundestag's Committee on Foreign Affairs.

Legislation

The current EEA/EFTA States do not have a co-decision right in the creation of new Single Market legislation. They do not have a vote. Rather they have a co-determination right which means that they have a right for their national technical experts to be involved in the creation of the rules. It is arguable that the current EEA/EFTA States have underutilised the potential available through co-determination. Nevertheless, it is undeniable that this is unattractive from a UK perspective.

Would the UK be able to negotiate the creation of such a co-decision right? It is plausible and would certainly be in the interests of the current EEA/EFTA States as well as Switzerland.¹¹² This would certainly be in line with Jacques Delors, offer in 1989 of "a new, more structured

¹⁰⁵ Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

¹⁰⁶ For an assessment of a range of options in this field, see *Sara Masters and Belinda Mcrae*, What Does Brexit Mean for the Brussels Regime? *Journal of International Arbitration* 33, Special Issue (2016): 483–500.

¹⁰⁷ Article 70(1)(a) Lugano II Convention.

¹⁰⁸ Case C-116/02 *Erich Gasser GmbH v. MISAT* EU:C:2003:657. *Sara Masters and Belinda Mcrae*, What Does Brexit Mean for the Brussels Regime? *Journal of International Arbitration* 33, Special Issue (2016): pages 490 and 491.

¹⁰⁹ Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, paragraph 80 and Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007.

¹¹⁰ *Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff*, Europe after Brexit: A proposal for a continental partnership, Bruegel, August 2016, page 8. *Carl Baudenbacher*, After Brexit: Is the EEA an option for the United Kingdom?, The 42nd Annual Lecture of the Centre for European Law, King's College, London (revised version, 13th October 2016), forthcoming *European Law Reporter*.

¹¹¹ *Ibid*, page 5.

¹¹² *Carl Baudenbacher*, After Brexit: Is the EEA an option for the United Kingdom?, The 42nd Annual Lecture of the Centre for European Law, King's College, London (revised version, 13th October 2016), forthcoming *European Law Reporter*.

partnership with common decision-making and administrative institutions.” The Bruegel authors were thinking along similar lines when they proposed “*The EU States and the Non-EU States could enter into a Continental Partnership Agreement, CPA. The discussion of single market legislation in a new CP Council, which would consist of EU institutions and Non-EU CP States, would take place and the CP States would have a right to propose amendments.*”¹¹³ This proposal is a ‘back to the future’ development of the EEA as the EU would, enact its law in its normal legislative procedure, but a political commitment would be made by the EU States to take into account the other countries’ considerations in the ‘CP Council.’

Financial contributions

The EEA/EFTA States pay to be members of the Single Market in terms of cohesion payments, as well as for their relative costs of administration in shared programmes e.g. Horizon 2020.¹¹⁴ Nevertheless, these cohesion payments are made through their own organisation and on their own projects. The UK would not need to make equivalent ‘Norway grants.’ Norway makes these payments voluntarily. Were the UK to join the EFTA pillar of the EEA, its total contributions would be approximately half of what is paid at present.¹¹⁵ It is further worthy of note that Switzerland also makes contributions for its limited access to the Single Market. The Bruegel paper also contends that if the UK were to remain in the single market, it would have to make payments into the EU budget.¹¹⁶

Intelligence, security and defence

The Foreign Secretary made clear on 11th September 2016 that “[l]eaving the EU is not about leaving Europe. We will remain the closest of allies, co-operating fully on intelligence, security, defence and foreign affairs.”¹¹⁷ These are fields in which it is in the undoubted interest of both the EU and the UK to ensure continued, full cooperation. Given the UK’s strengths in these fields a pure bilateral relationship between the UK and EU is paradoxically in neither’s interest as they are critical for the well-being of Europe at large. The Bruegel paper suggests that the Continental Partnership should be a forum for foreign security and defence policy.¹¹⁸

Conclusion

The EEA Agreement has proved itself to be a robust, durable and pragmatic instrument of extending the Single Market for more than 20 years. It has no federalist ambition and leaves sovereignty in national hands, and has demonstrated that the two pillar structure works well in Europe. An updated version could be a natural home for the UK post Brexit. Revisions to the EEA are both possible and achievable and would be in the interests of the EU, the current EEA/EFTA States and potentially Switzerland.

¹¹³ *Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff*, Europe after Brexit: A proposal for a continental partnership, Bruegel, August 2016, page 7.

¹¹⁴ The EU’s research and innovation programme.

¹¹⁵ *Carl Baudenbacher*, After Brexit: Is the EEA an option for the United Kingdom?, The 42nd Annual Lecture of the Centre for European Law, King’s College, London (revised version, 13th October 2016), forthcoming European Law Reporter.

¹¹⁶ *Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff*, Europe after Brexit: A proposal for a continental partnership, Bruegel, August 2016, pages 7 and 8.

¹¹⁷ <https://www.thesun.co.uk/news/1762488/gisela-stuart-boris-johnson-leads-change-britain-campaign-to-ensure-brexit-is-a-success/>

¹¹⁸ *Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff*, Europe after Brexit: A proposal for a continental partnership, Bruegel, August 2016, page 9.