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“25 Years EEA – Could the EEA Offer a Solution to the Brexit Conundrum?”

Section for External Relations of the European Economic and Social Committee, 24 May 2019
I. A distinct form of integration

1. Economic integration
   • Extension of the EU single market to the EEA/EFTA States
   • Political integration left to intergovernmental action

2. Sovereignty of EEA/EFTA States untouched in the fields of foreign trade, foreign politics, agriculture, fisheries

3. Two pillar model
   • Own institutions of the EFTA pillar (EFTA Surveillance Authority and EFTA Court)
   • “A distinct legal order of its own” (E-9/97 Sveinbjörnsdóttir)
I. A distinct form of integration

4. Longevity of the two pillar model

• From 7 to 5 to 3 EFTA States and from 12 to 28 (27) EU States

• EFTA pillar since 1995: A pond with a big fish and two minnows

• EU agencies as a challenge

  • New financial architecture

• Third Energy Package (see my legal opinion for the Icelandic Foreign Ministry of 5 May 2019, https://www.althingi.is/altext/erindi/149/149-5447.pdf)
II. Key features

1. Legislation
   • Homogeneity principle
   • Decision shaping vs decision making
   • Taking over of new EEA relevant EU law by the EEA Joint Committee

2. Surveillance
   • Homogeneity principle
   • EFTA Surveillance Authority following Commission
   • EFTA Surveillance Authority going first
3. Judicial control

• Homogeneity principle

• EFTA Court following ECJ

• ECJ following EFTA Court (Going first and EFTA values)

• Cases: E-3/00 Kellogg’s; E-1/04 Fokus Bank; E-4/09 Inconsult; E-15/10 Norway Post; E-8/13 Abelia; E-16/16 Fosen Linjen; E-5/16 Vigeland.

• EFTA Court is an independent court of law.

• No competences of the EEA Joint Committee in case of judicial conflict.
1. Two souls in Europe’s breast (Switzerland included)

   • Common law countries vs civil law countries
   
   • England is the birthplace of the common law
   
   • FRA, GER, ITA, ESP are the most important civil law countries
   
   • NOR, ICE, CH, LIE: Hybrids between common and civil law
     
     • Article 1 of the Swiss Civil Code: Judge as legislature
     
     • ICE and NOR do not have a concise civil code
     
     • Swiss judges in LIE; Anglo-Saxon trust legislation

III. Brexit and EFTA
2. Other commonalities of UK and the (four) EFTA States

• Belief in free trade and open markets

• No Hegelian glorification of the state as “the reality of the moral idea” in UK, CH and LIE

• No French concept of “la Nation” as being the only legitimate power

• NOR characterised by a strong state

• This is, however, not the case in ICE

• François Hollande in June 2016: EU27 should consider “adapting” EU competition law focusing on growth, employment and investment.
III. Brexit and EFTA

2. Other commonalities of UK and (four) EFTA States

• Image of man

  • UK, CH, LIE: Assumption that human beings are reasonable in the sense of “normal.”

  • The man on the Clapham omnibus (Lord Justice Greer in Hall v Brooklands Auto-Racing Club, 1933).

  • EFTA Court E-4/09 Inconsult; E-15/15 and E-16/15, Vienna Life and Swiss Life: The same.

  • Goes against the German concept of “Lizzi Miller”.


IV. Brexit and EEA

1. Common values UK – EEA/EFTA States (as described)

2. Own institutions of the EFTA pillar (as described)

3. Regaining sovereignty in foreign policy, agriculture, fisheries
   • General
   • As regards sovereignty in foreign trade: For the time being Irish problem
   • Technical solutions in the near future?

4. Access to the single market (also for City of London)
IV. Brexit and EEA

5. Legislation: Alleged “rule taking” – exaggerated

- Assessment of EEA relevance
- Input in decision shaping phase
- EEA Council
- EEA Joint Committee
- Acceptance by national Parliament

6. Free movement of persons

- No concept of union citizenship, but Directive 2004/38 is part of EEA law; EFTA Court case law.
- Safeguard measures under Article 112 EEA?
IV. Brexit and EEA

5. Legislation: Alleged “rule taking” – exaggerated

- Norway has enormous influence in the fields it considers vital
- Assessment of EEA relevance
- Input in decision shaping phase
- EEA Council
- EEA Joint Committee
- Acceptance by national Parliament
- UK would in view of its size, have considerable bargaining power.
V. Alternatives

1. UK Government’s withdrawal agreement

   - Including the “Ukraine mechanism” for dispute resolution

   - Martin Howe, QC: The “independent” arbitration panel will simply act as a “postbox for sending the dispute to the ECJ. And as a rubber stamp when the answer comes back.”

   - Mervyn King: “Vassal States do not go gently into that good night. They rage.”

   - Compare Dylan Thomas’s famous poem about death.

   - Compare the 1701 Act of Settlement

2. No deal Brexit

3. Remain
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