



BREXIT: WILL THE UK REMAIN IN THE EEA DESPITE LEAVING THE EU?

When the UK withdraws from the EU, the most likely legal position is that the UK will also fall out of the EEA and will therefore not be able to participate as an EEA member in the single market. But even if that is not so legally, it may take a long time to persuade the other members of the EEA that the UK remains a participant, during which time the UK will not benefit in practice from the single market.

Introduction

The European Economic Area has been widely canvassed as a possible home for the UK after it leaves the EU, a domicile commonly referred to as the Norwegian option. There are political and other difficulties in this (see our briefing *After Brexit*), but a think tank, British Influence, has recently suggested, somewhat tentatively, that because the UK is already a member of the EEA, the UK may remain a member of the EEA notwithstanding Brexit, thus potentially retaining access to the EU's single market through a side door.

The think tank said that the Government's position that withdrawal from the EU leads to automatic departure from the EEA is "unproven" (self-evidently correct since no one has left the EU since the EEA Agreement came into force). It has demanded clarity on the Government's position ahead of potential legal proceedings. Echoing the arguments in *R (oao) Miller v Secretary of State for Exiting the European Union*, the think tank appears to contend that the UK must invoke the withdrawal procedures in the EEA treaty if the UK wants to leave the EEA, and that requires prior Parliamentary approval. The think tank considers that the UK can enhance its negotiating position with the EU by contending that the UK will, despite Brexit, remain in the EEA and the single market.

The argument that the UK will remain in the EEA even if it withdraws from the EU raises intriguing and obscure legal points, but the practical implications may be less significant. For example, even if the UK does remain a member of the EEA, it is not clear what rights or obligations membership would entail since these are conferred on EU and EFTA member states, not on individual states. Even if the UK considers that it is still within the EU's internal market because of the UK's continuing EEA membership, that will not bring any benefits if the other members of the EEA refuse to accept that position. This might lead to the EEA's dispute resolution provisions being invoked, which will not be a quick or easy exercise.

The EEA Agreement

The EEA Agreement was signed in Porto on 2 May 1992, and came into force on 1 January 1994. In its current form, it brings together three of the four members of EFTA (Norway, Iceland and Liechtenstein, not Switzerland) and the EU's member states with the intention of enabling the three EFTA states to participate in the EU's single market. As such, the EEA Agreement applies to a large degree the EU's measures on freedom of movement of goods, capital, services and persons. One difference some have highlighted is article 112 of the EEA Agreement, which allows a member to take unilateral "safeguard

KEY ISSUES

- Leaving the EU probably entails leaving the EEA or losing the benefits of the single market
- Even if that is wrong, it is the other EEA member states' view that matters, not the UK's
- If the other EEA members do not accept that the UK is also a member, de facto the UK will not benefit from the single market
- It would take years of litigation in other member states' courts and/or international tribunals to determine the true legal position

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measures" if it faces "serious economic, societal or environmental difficulties of a sectorial or regional nature". Liechtenstein (population c.37,878) has used this provision to impose quantitative restrictions on immigration.

The EEA also encompasses other areas, such as consumer protection, company law and social policy, but it does not include a customs union, trade policy, agriculture or justice and home affairs.

The parties to the EEA Agreement are split into two camps: on one side is the European Community (now the European Union) and all its member states; and on the other, Iceland, Liechtenstein and Norway, defined as the "EFTA States". All the parties are referred to as the "Contracting Parties", which are then sub-defined, so far as EU member states are concerned, between the EU itself, the EU and its members, and the EU's members, the correct interpretation depending upon the EU's competence under its treaties (see the box on the right).

The EEA Agreement applies to the territories of the three EFTA States and "to the territories to which the Treaty establishing the European Economic Community is applied under the conditions laid down in that Treaty" (article 126(1)). Article 50 of the Treaty on European Union provides that the EU's treaties will cease to apply to a withdrawing state from the date of entry into force of a withdrawal agreement or, failing that, two years after the state's notification of its intention to withdraw from the EU. The EU's treaties will, therefore, cease to apply to the territory of the UK when the UK leaves the EU.

The EEA Agreement imposes obligations on and grants rights to the Contracting Parties. So, for example:

- "free movement of goods between the Contracting States shall be established" (article 8(1))
- "freedom of movement of workers shall be secured among EC Member States and EFTA States" (article 28(1))
- "there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States" (article 31(1))
- "there shall be no restrictions on the freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended" (article 36(1))
- "any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts or threatens to distort competition... shall, in so far as it affects trade between Contracting States, be incompatible with the functioning of this Agreement" (article 61(1))

The EEA Agreement also establishes various institutions. These include the EEA Council, which consists of "members of the Council of the European Communities and members of the EC Commission, and one member of the Government of each of the EFTA States" (article 90(1)), and the Joint Committee, which consists of representatives of the Contracting Parties and which takes decisions "by agreement between the Community, on the one

The EU's Contracting Parties to the EEA Agreement

"... the Community and the EC Member States, or the Community, or the EC Member States. The meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this agreement and from the respective competences of the Community and the EC Member States as they follow from the Treaty establishing the European Economic Community" (article 2(c)).

hand, and the EFTA States speaking with one voice, on the other" (article 93(2)).

In addition, article 116 requires that a "Financial Mechanism shall be established by the EFTA States to contribute... to the objectives laid down in Article 115", ie "the need to reduce the economic and social disparities between [the Contracting Parties'] regions". This Mechanism is currently set out in Protocol 38c, which requires payments by EFTA member states over the period from 2014 to 2021.

Article 127 provides that "each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties".

What is the effect on EEA membership of leaving the EU?

The UK is a party to the EEA Agreement in its own right. Prima facie, the UK's departure from the EU will not undo that. Nothing in the Agreement expressly deals with the consequences of an individual state withdrawing from the EU (or, indeed, from EFTA). There is a spectrum of possible effects of the UK's withdrawal from the EU on the UK's participation in the EEA. The spectrum ranges over the following.

First, it might be implied that membership of the EEA is contingent on continuing membership of EU or of EFTA, and automatically lapses on that requirement no longer being met. For example: the two sides to the Agreement are the EU and EFTA; the institutional arrangements require participation from these two sides with no provision for any third country; there is no provision for financial contribution by a third party; and the Agreement only applies, so far as EU members are concerned, to the territories subject to the EU's treaties. Being outside the EU or EFTA is simply inconsistent with continued EEA membership. (A variant on this might involve the other parties invoking article 62 of the Vienna Convention on the Law of Treaties to suspend the EEA Agreement so far as the UK is concerned because the UK's withdrawal from the EU represented a fundamental change of circumstances.)

Secondly, it might be that the UK is only an individual party to the EEA Agreement for those aspects that fall outside the EU's competence. This might follow from, for example, the definition of the "Contracting Parties" (article 2(c), quoted above) and from the requirement for freedom of movement between EU and EFTA states, not between their individual member states. The internal market falls within the EU's competence, and the UK is not an individual party to the EEA Agreement for the purposes of the provisions dealing with the four freedoms. The UK cannot therefore continue to take advantage of the provisions regarding the internal market once it has left the EU, though the UK might still be bound by other parts of the Agreement.

Thirdly, it is possible that the UK is and will remain a full party to the EEA Agreement but that, on the UK's withdrawal from the EU, the principal provisions of the EEA Agreement will, in accordance with their express terms, no longer benefit the UK. For example, the EEA Agreement applies to the territories to which the EU's treaties apply (article 126(1), quoted above). When the UK leaves the EU, the EU's treaties will cease to apply to the UK, with the result that the EEA Agreement will also cease to apply in the UK. Similarly, the EEA Agreement requires the free movement of workers between EU and EFTA states, not between EU member states and a third country that happens to be a party to the Agreement. The provision would simply have no continuing

A spectrum of EEA possibilities on Brexit

- Membership of the EEA lapses automatically
- The UK remains an EEA member, but only for those parts outside the EU's competence
- The UK remains an EEA member, but the benefits of membership no longer apply to the UK
- The UK remains a full party to the EEA Agreement entitled to all the Agreement's benefits

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application to the UK. Withdrawal from the EU would, therefore, result in most of the EEA Agreement withering on the vine far as the UK was concerned.

Fourthly, as British Influence suggests (building on an argument raised by an Oxford academic), the UK might remain a full party to the EEA Agreement and continue to be entitled to take advantage of the internal market and the other provisions of the Agreement. On this argument, the references to EU members should be read as references to the actual parties to the Agreement which were, at the relevant time, members of the EU, not to members of the EU for the time being - after all, new EU members must apply to become parties to the EEA Agreement. Article 126(1) does not say that the Agreement *only* applies to territories subject to the EU's treaties and to the three EFTA states. The UK might lack a real voice in the institutions of the EEA, but that is the only price for leaving the EU (perhaps compensated by the absence of any obligation to contribute to the EU's social fund).

The last of these possibilities is the least likely. There can be no doubt that the EEA Agreement was established for members of the EU and the EEA, not for third countries that belong to neither. The EEA Agreement, particularly the institutional arrangements, don't cover a third category of participants. The parties to the EEA Agreement could, of course, agree that there should be a new category of participant but, even assuming a willingness to do so, that would take many years to put into effect.

Does the UK's view matter?

The legal threat appears to be to take the UK Government to the UK's courts on the basis that the UK will remain a member of the EEA, and the Government cannot or should not cause the UK to leave the EEA without first securing Parliamentary approval to serve notice under article 127 of the EEA Agreement. Even if correct, the practical implications of this argument may be limited legally for two reasons.

First, if the UK Government wins its appeal to the Supreme Court in *R (oao) Miller v Secretary of State for the European Union*, any force this argument might otherwise have had will fade. If the Government has the constitutional authority to serve notice under article 50 of the Treaty on European Union, it surely also has power to do whatever is necessary to pull the UK out the EEA. If, however, the Government loses its appeal in *Miller*, the legislation required to allow service of notice under article 50 of the TEU could include extra wording to cover the EEA. Arguments about the EEA will in practice be subsumed by those concerning the EU. This would not stop the UK Government adopting the think tank's argument in negotiations with the EU if the Government considered that there was tactical advantage in doing so, but control would remain in the Government's hands.

Secondly, the UK's internal constitutional requirements for leaving the EEA are likely to be a side show. If the Government were to reverse its current position (whether as a result of court action or a change of strategy) and assert that, despite leaving the EU, the UK remained a member of the EEA and, with that, was entitled to participate in the single market, the real issue would be the response of the other members of the EEA.

If all the other members of the EEA agreed that the UK continued to be within the single market, no problem. But if, as is more likely, they disagreed, they would refuse to accept the free movement of goods from the UK, would impose restrictions on UK workers and generally treat the UK as a third state. To be

"The UK might remain a full party to the EEA Agreement and continue to be entitled to take advantage of the internal market and the other provisions of the Agreement... but that is least likely of the possibilities"

consistent, the UK would at the same time have to allow free movement of goods and services from the EU in accordance with the EEA Agreement, which may not be attractive either economically or politically.

UK persons directly affected by EU restrictions could take legal action in the national courts of an EU (or EFTA) member state, depending upon local law (they could do this whatever the UK's Government's position, at least unless and until the Government served formal notice of departure under article 127 of the EEA Agreement). This dispute could then wend its way to the Court of Justice of the European Union and/or the EFTA Court, which would decide whether the UK was still within the single market. In the light of the UK Government's desire to be freed from the shackles of foreign judges, this may not be an attractive solution.

Ultimately, whether the UK remained a member of the EEA would be a dispute between the UK on the one hand and the undoubted EEA members on the other to be resolved in accordance with the EEA's dispute resolution provisions, in article 111 of the EEA Agreement.

Even this is not straightforward. Article 111 is based on the assumption that a dispute will be between the EU and EFTA, and is not easy to apply to a party that belongs to neither. Article 111(1) starts by allowing the EU or an EFTA State to bring a dispute on the interpretation of the Agreement before the Joint Committee, which may settle the dispute. The Joint Committee operates by agreement between the EU and the EFTA States (article 93(2), quoted above), which is impracticable for a complainant that is in neither camp. If the Joint Committee has not resolved the dispute within six months, a Contracting Party is entitled to take self-help remedies under article 102 or 112(2). There is, however, nothing in practice that the UK can do in this regard save retaliation, which would presumably only place the UK in the position the EU would say it should be in any event. Article 111(4) goes on that if a dispute concerns these self-help remedies and it has not been resolved by the Joint Committee within three months, a Contracting Party may refer the dispute to binding arbitration under Protocol 33.

These dispute resolution procedures may simply be inapplicable if a dispute involves a country that is within neither EFTA nor the EU, or it may be possible to find a way to muddle through to arbitration, assuming a degree of goodwill. Alternatively, another form of dispute resolution might be agreed, whether through the Hague Court of Permanent Arbitration, the International Court of Justice or elsewhere.

Whatever form of dispute resolution is used, it is highly unlikely to be completed by the time that the UK leaves the EU - indeed, it may not even have started by then. If the other parties to the EEA Agreement declined to accept that the UK remained entitled to participate in the single market, the practical reality would be that, absent agreement, the UK would be outside the single market when it leaves the EU. That would be the case whatever the legal position, but the legal position is probably the same.

Conclusion

Whether the UK remains a member of the EEA and, through that, enjoys access to the single market despite withdrawal from the EU raises interesting legal points. The practical implications of those points are, however, likely to be limited.

Article 111 of the EEA Agreement

"(1) The Community or an EFTA State may bring a matter under dispute which concerns the interpretation or application of this Agreement before the EEA Joint Committee...

(2) The EEA Joint Committee shall settle the dispute...

(3) If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community... and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.

If the EEA Joint Committee in such a dispute has not reached an agreement on a solution within six months... a Contracting Party may, in order to remedy potential imbalances

- either take a safeguard measure in accordance with Article 112(2) and following the procedure in Article 113

- or apply Article 102 mutatis mutandis.

(4) If a dispute concerns the scope or duration of safeguard measures... and the EEA Joint Committee after three months from the date when the matter was brought before it has not succeeded to resolve the dispute, any Contracting Party may refer the dispute to arbitration under the procedures laid down in Protocol 33. No question of interpretation of this Agreement referred to in paragraph 3 may be dealt with in such procedures. The arbitration award shall be binding on the parties to the dispute."

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