Heading for the exit: is notice of the UK's withdrawal from the European Economic Area unnecessary?

Oliver Jackson

FOREWORD

Amongst all the recent controversies and debate about Brexit, a little noticed feature has been the UK's position as a contracting party to the European Economic Area Agreement. Article 127 of that Agreement provides for a contracting party to withdraw on at least 12 months' notice. But 29th March 2018 came and passed without the UK giving such notice.

There have been only two academic papers on the consequences of the UK's non-withdrawal as a contracting party. They have arrived at sharply differing conclusions. The former head of EEA Legal Services, Dora Tynes, and a current EFTA legal officer, Elisabeth Haugsdal, consider that the UK will automatically cease to be a party on leaving the EU – a position accepted by the UK Government. On the other hand, Professor George Yarrow of Oxford University would follow the literal meaning of the Agreement, under which the UK would remain a contracting party.

Quite how much of the benefits and burdens of EEA membership could then survive for a non-member of the EU or EFTA raises further interesting questions. Two members of the Society's Executive, Anthony Speaight QC and David Wolfson QC, argued in a letter published in *The Times* last year that this offered possible tactical opportunities for the UK in negotiations.

The present paper, which expresses no view on the substantive merits of EEA membership or other political question, analyses the two rival academic positions. It concludes with a third approach.

The author is the Society's current Lyell Scholar. He brings to this topic the benefit of discussion with Professor Carl Baudenbacher, former President of the EFTA Court, and Dr Georges Baur, Assistant Secretary-General to the EEA Coordination Division at EFTA.

I commend this paper to both the Party and the legal academic community as a valuable contribution on a topic which could yet prove of critical, political importance in the uncertain months ahead.

VICTORIA PRENTIS, MP.
Chair of the Executive Committee of the Society of Conservative Lawyers

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Abstract

The paper examines two competing arguments concerning the legal status of the UK as a Contracting Party to the European Economic Area Agreement ("the Agreement") post-Brexit. To understand the legal nature of the Agreement it is necessary to consider the institutional set-up of the EEA, centred on the two pillar system of the EU and EFTA and their respective institutions. While the decision making and disputes resolution procedures relevant to the application and interpretation of the Agreement rely on this two-pillar system, the EEA Agreement nevertheless conveys rights and duties to individuals and undertakings outside of this system. Thus, on the face of the Agreement, it is possible for these rights and duties to persist but with significant uncertainty as to how to enforce them. The author concludes that while on the plain interpretation of the Agreement the UK can remain a Contracting Party to the Agreement without adhering to one of the two pillars, in practice a more ambitious interpretation will be found to obviate the legal uncertainty that would otherwise result.

Introduction

1. In the aftermath of the UK's decision to leave the European Union ("EU/EC") the status of the UK's future relationship with the EU continues to be debated. One option is continued participation in the European Economic Area ("EEA"). However, there remains considerable uncertainty as to the UK's legal position within the EEA after the UK's withdrawal from the EU on 29 March 2019. This article discusses whether the UK automatically withdraws from the EEA when it leaves the EU. A general description of the EEA Agreement[1] ("the Agreement") will be provided as well as a discussion of the UK's legal position as a Contracting Party to that Agreement.

2. Two competing arguments will be assessed. The first, advanced by Dóra Sif Tynes and Elisabeth Lian Haugsdal, argues that it is not possible for the UK to remain a Contracting Party to the EEA Agreement without adhering to one of the two pillars. They is the only way to make decisions, resolve disputes, and ensure the effective application and enforcement of EEA law.[2] Tynes is the former Head of EEA Legal Services at the European Free Trade Association ("EFTA") Secretariat and an Attorney-at-Law in Iceland, while Haugsdal is a current legal officer at the EFTA Secretariat. The second, advanced by Professor George Yarrow, Emeritus Fellow of

[1] http://www.efta.int/Legal-Text/EEA-Agreement-1327

[2] Dóra Sif Tynes and Elisabeth Lian Haugsdal, 'In, Out or In-between? The UK as a Contracting Party to the Agreement on the European Economic Area' [2016] 5 ELR 753.

Herford College, Oxford and Chairman of the Regulatory Policy Institute, advocates for a textual interpretation of the Agreement. He argues that exit from the EEA can only be effected by giving notice to all Contracting Parties under article 127 of the Agreement, notice that the UK Government has not given.[3] The implications of Yarrow's argument, if correct, are significant. They could result in the UK remaining a Contracting Party to the Agreement after her withdrawal from the EU, with all the benefits and obligations that such EEA Contracting Party status entails.

3. The author would like to thank Professor Carl Baudenbacher, former President of the EFTA Court, and Dr Georges Baur, Assistant Secretary-General to the EEA Coordination Division at EFTA, for their helpful discussions during the preparation of this paper. The author will refrain from any speculation as to the relative merits or disadvantages of the UK remaining bound by the EEA Agreement, or any more political questions relating to future negotiations.

What are the main features of the EEA Agreement?

4. The EEA unites the EU Member States and the three EEA European Free Trade Area ("EEA EFTA") states into an internal market governed by the same basic rules. These rules aim to enable goods, services, capital and persons to move freely around the EEA in an open and competitive environment. To police and enforce this dynamic and homogenous EEA the Agreement provides for means of enforcement, including at the judicial level.

5. The Agreement is modelled on the EU Treaty in its provisions on the free movement of goods, persons, services and capital, freedom of establishment, as well as competition and State aid. It is identical in wording to the corresponding provisions of the EU Treaty at the time of its signing in 1992. However, the EEA does not cover the EU Customs Union, Common Agricultures and Fisheries Policy, Common Trade Policy, and certain other EU policies. The three EEA EFTA states – Iceland, Liechtenstein and Norway – are not bound by EU legislation in these areas. In effect, the EEA allows these EEA EFTA states to participate in some aspects of the EU and not others. Despite the main text of the Agreement remaining unaltered since its entry

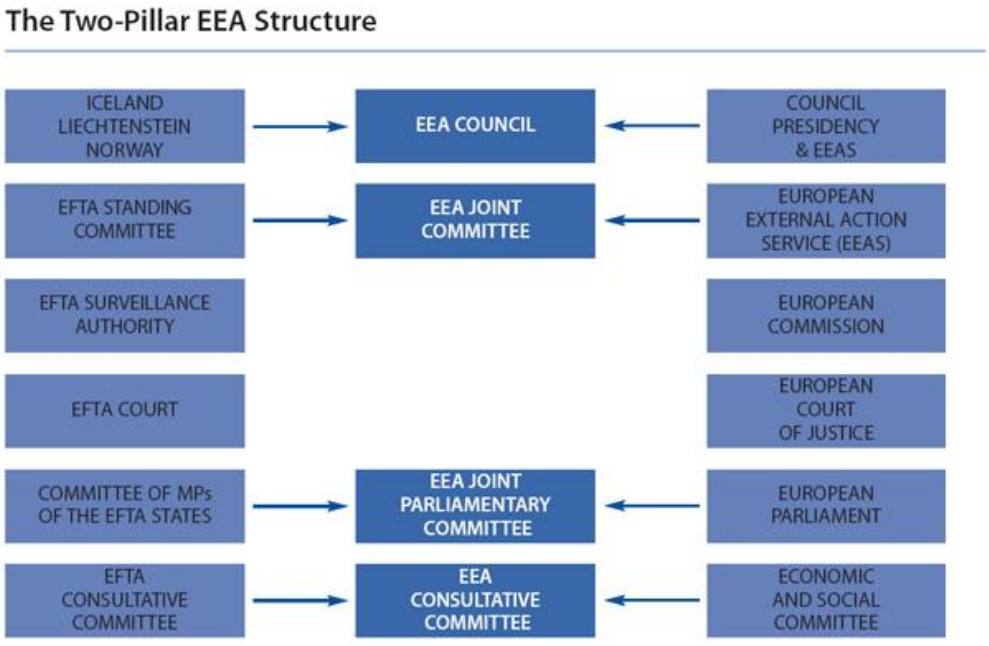
[3] George Yarrow, 'Brexit and the Single Market' [2016] 6.1 Essays in Regulation, Regulatory Policy Institute; available here:
http://www.rpieurope.org/Publications/Yarrow_Brexit_and_the_single_market.pdf

into force on 1 January 1994 it has acquired a dynamism through the incorporation of the relevant EU *acquis* into its Annexes on a continues basis.

6. For the purposes of the internal market and the relevant EU *acquis* which has been incorporated into the Agreement, EEA EFTA states are considered to be EU Member States. However, the Agreement is an international treaty freestanding from and independent of the EU and its treaties. It is not solely a treaty between the EU and the three EEA EFTA states. All the individual member states comprising the EU signed it independently of the EU. These EU member states, including the UK, are listed at the start of the Agreement and referred to throughout the Agreement as the Contracting Parties. Were the UK not an independent Contracting Party, and a member of the EEA purely by virtue of being a member of the EU, it would be trite law to state that the UK would cease to be a member of the EEA when it leaves the EU on 29 March 2019. As it is, the position is more complicated.

How are disputes settled under the EEA Agreement?

7. The institutional framework of the EEA consists of two pillars. The EU and its institutions constitute one pillar (EU bodies) while the EEA EFTA states constitute the other pillar, mirroring those of the EU. Between these two pillars a number of joint bodies have been established. The below diagram describes these in more detail:



This diagram illustrates the management of the EEA Agreement. The left pillar shows the EFTA States and their institutions, while the right pillar shows the EU side. The joint EEA bodies are in the middle.

8. While the political nature of the EEA Agreement shines through the main consensual decision-making process, the Agreement also lays down different mechanisms for dispute settlement. If the EEA Joint Committee cannot agree on the incorporation of an act, article 102 provides that the relevant part of the Agreement may be provisionally suspended. Article 102(4) requires the Contracting Parties to take a decision regarding the incorporation of an EU act within six months of the date of the initial referral to the EEA Joint Committee. In practice this deadline is not strictly enforced, and in the two instances in which the article 102(4) procedure was initiated the dispute over the incorporation of *acquis* was resolved before any part of the Agreement was suspended.[4]

9. Article 111 establishes further general principles for the settlement of disputes. The EU or EEA EFTA state may bring a matter under dispute concerning the interpretation or application of the Agreement before the EEA Joint Committee. This may, though only with the unanimous agreement of the parties and if the dispute centres on a provision identical in substance to provisions of the EC Treaties, request that the European Court of Justice (CJEU) give a ruling on the relevant interpretation. If the EEA Joint Committee has not reached an agreement within six months, and the parties have not requested a ruling by the CJEU, then the parties may unilaterally take safeguard measures under articles 112 and 113.

10. Articles 112 and 113 provide that a party may take safeguard measures if serious economic, societal or environmental differences that are liable to persist arise. Measures should be restricted in scope and duration and must apply to all Contracting Parties. Article 114 provides that a Contracting Party may also take safeguard measures to remedy any imbalance between rights and obligations under the Agreement. Should no resolution be forthcoming, under Protocol 33 of the Agreement any Contracting Party may refer the dispute to arbitration. This protocol has never been initiated.

What obligations are taken on by signatories to the EEA Agreement?

11. These dispute resolution mechanisms can only be activated by an EC member state or an EFTA state. Indeed, throughout the Agreement the drafting explicitly delineates

[4] Tynes and Haugsdal, 759.

between 'Contracting Parties' and 'EC Member States and EFTA States'. Some provisions are addressed to the former, some to the latter, and some to both. What obligations, rights or duties are taken on by nation states therefore depends on who the relevant provisions are addressed to.

12. If a nation state is both a Contracting Party and either an EC Member State or an EEA EFTA State, as all signatories have been since its conception, then this is a distinction without a difference. If, however, a nation state is a Contracting Party to the Agreement but not a member of the EU or EFTA then greater difficulties arise. This is the situation the UK could find itself in upon leaving the EU on 29 March 2019.

13. Consider article 16 of the Agreement as a first example of the legal complications that could arise if the UK remains a Contracting Party but not an EU member state. Article 16 states:

> *"The Contracting Parties shall ensure that any State monopoly of a commercial character be adjusted so that no discrimination regarding the conditions under which goods are procured and marketed will exist between nationals of EC Member States and EFTA States."*

14. Under this article the UK, as a Contracting Party, is obliged to adjust any State monopoly of a commercial character (such as certain public procurement practices within the NHS, for example) to prevent discrimination in favour of EC Member State nationals over EFTA State nationals, or vice versa, in the procurement and marketing of goods. That is, the UK could not discriminate in favour a Norwegian supplier over a German supplier. Post-Brexit, the UK would lose such reciprocal protection. An EC State with a State monopoly of a commercial character (such as France's nationalised train service, for example) could erect barriers to the entry of goods that would otherwise be procured from UK nationals, cutting the UK out of the market. Such a specific discriminatory action would not prevented under this Article as UK nationals will no longer be nationals of an EC Member State or an EFTA State.

15. A second example can be found at article 34. This provides that:

> *"Companies… formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall… be treated*

in the same way as natural persons who are nationals of EC Member States or EFTA States."

16. Post-Brexit, a company founded under German domestic law with its principal place of business in the UK could avail itself of favourable EU or EFTA law while a company founded under the law of England and Wales but with its principal place of business in Germany could have no such option. A UK company attempting to establish its principal place of business in Munich could face obstructions, for example, while a German company attempting to do the same in London would encounter no such hurdles. This interpretation of article 34 is supported by article 124, which states:

> *"The Contracting Parties shall accord nationals of EC Member States and EFTA States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 34, without prejudice to the application of the other provisions of this Agreement."*

17. At the risk of labouring the point, the converse does not apply. EC member states are not obliged to accord nationals of Contracting Parties the same treatment as their own nationals.

18. A third example can be found at article 40, which states that: "*…there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States."* The implication is that there could be such restrictions between the Contracting Parties on movement of capital belonging to persons resident in post-Brexit UK.

19. Finally, the most problematic example is found at article 36. This states:

> *"Within the framework of the provisions of this Agreement, there shall be no restrictions on 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."*

20. Under this provision there the UK could impose no restrictions on a national of an EC Member State or an EFTA state established in France from providing a service in the UK. However, UK nationals would enjoy no reciprocal rights. The UK would remain open to competition in services from all EEA states but would see the ability of UK services providers to respond curtailed.

21. This short list is not intended to form an exhaustive compendium of the issues arising from the Agreement post-Brexit should the UK still remain subject to its provisions as a Contracting Party. Further problems also arise from the interplay between article 28, which guarantees freedom of movement for workers solely between EC and EFTA states, and article 29(b), which requires that all Contracting Parties provide such workers with access to a social security system in order to further that freedom. Moreover, article 29(a) obliges Contracting Parties to aggregate periods of time counting towards benefit calculations within '*the several countries*', a loosely drafted phrase that could apply to the territories of the Contracting Parties or the territories of the EC and EFTA states, while article 53 proscribes anti-competitive practices within '*the territory covered by this Agreement*', an equally nebulous jurisdiction.

22. These examples are simply meant to demonstrate that it is a question of no small importance to the UK, the EFTA states and the EC Member States as to whether the UK will remain bound by the Agreement as a Contracting Party after leaving the EU in March 2019.

The UK could have given notification of its withdrawal under article 127

23. This problem could be sidestepped by the UK explicitly withdrawing from the EEA. The Agreement provides for the procedure to be followed by any state wishing to follow this course. Article 127 states: "*Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties.*" The UK is due to withdraw from the EU on 29 March 2019. Had the UK unilaterally given an article 127 notice before 29 March 2018 to all the other Contracting Parties then it could have unambiguously withdrawn from the Agreement and the territory of the EEA at the same time it withdraws from the EU. Such notice would require formal approval from the UK Parliament.[5] However, such notice was not forthcoming. This option is therefore no longer viable. Even if the UK activated article 127 over the summer of 2018 that would simply start the twelve-month clock. The UK would remain a member of the EEA for at least a few months after withdrawing from the EU.

24. It could be suggested that the UK's giving of notice to leave the EU under article 50 of the Treaty on European Union (TEU) 29 March 2017 can also constitute, whether through inference or impliedly, giving notice under article 127 of the Agreement. This

[5] *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5.

is implausible. Article 127 notice is required to be given to all the other Contracting Parties. These include the EEA EFTA states, who did not receive the UK's article 50 notification. Moreover, while there may be some leeway as to what exactly such a notice necessitates, it would be an unusual precedent of international law if all elements of formality could be dispensed with.

25. A further suggestion could be that article 127 notification only has to be given twelve months before the end of the transition period currently being negotiated to last until December 2020. This argument assumes that the transition period will encompass continued membership of the EEA, whereas in reality the transition period only addresses continued alignment with the EU, not the EEA. The EEA is not mentioned in the Draft Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, published by the EU Commission on 19 March 2018.[6] It also assumes that ensuring continued 'alignment' with the EEA Agreement is within the gift of the EU Commission to negotiate. Yet, as has been emphasized, the EEA and the EU are to entirely separate bodies. Such negotiations would have to be conducted with the EEA Joint Committee and the EEA Council. The argument further assumes that the provisions of the EEA Agreement addressed to EU Member States and EFTA EEA States can continue to apply to the UK even after it formally withdraws from the EU on 29 March 2019. No matter how the transition period is negotiated, as a matter of law and of fact the UK will no longer be an EU Member State.

26. In short, events have overtaken the applicability of article 127.

Argument 1: The UK will leave the EEA upon withdrawal from the EU even without giving notice under article 127

27. The position adopted by UK Government is that there is no need to give article 127 notice to withdraw from the EEA when the UK is also withdrawing from the EU. The latter entails the former. On 7 September 2017 the Secretary of State for Exiting the EU, David Davis MP, stated that the UK "*is a party to the EEA agreement in its capacity as an EU member state, so on exit day the EEA agreement will cease to operate in respect of the UK.*

[6] https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf

It will no longer have any practical relevance to the United Kingdom."[7] He went on to say that "*…the Government's legal position is clear: article 127 does not need to be triggered for the agreement to cease to have effect…"* In so doing he echoed the Prime Minister's statement in the House of Commons on 29 March 2017, where she stated: "*Membership of the EEA is linked to our membership of the European Union, and our notification in relation to leaving the European Union also covers the EEA."*[8] The UK Government has not disclosed the legal advice on which this opinion is based.

28. This is not to say that the UK Government's position does not have support from legal quarters. Professor Carl Baudenbacher, the former President of the EFTA court, has stated that:

> "*A state can only be an EEA Contracting Party either qua EU membership or qua EFTA membership. That follows from the two pillar structure of the EEA agreement. You are either in the EU pillar or in the EFTA pillar but you cannot be floating around freely."*[9]

29. The most in-depth analysis of this argument is provided by Dóra Sif Tynes and Elisabeth Lian Haugsdal in their paper '*In, Out or In-between? The UK as a Contracting Party to the Agreement on the European Economic Area*'. Though published in late 2016 in the expectation that the UK would give notice under article 127, its central discussion of the legalities of EEA membership is still relevant and informative.

30. Tynes and Haugsdal make four arguments that a state can only be a member of the EEA as EEA EFTA state or an EU member state. The crux of their paper revolves around the argument that the rights and obligations deriving from the EEA Agreement are a matter of EU law as regards the non-EEA EFTA state Contracting Parties. Article 216(2) TFEU states that, as an integral part of EU law, agreements concluded by the Union are binding upon both the Union institutions and the Member States. This is also the case for 'mixed agreements', such as the Agreement, which relates to fields covered in part by the EU treaties.[10] Member States' obligations under the Agreement are therefore of EU law, not public international law, nature. Further, competence to

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[7] https://hansard.parliament.uk/Commons/2017-09-07/debates/2179DA56-291E-44C0-9B50-A7A2CA5F4952/MembershipOfTheEuropeanEconomicArea

[8] https://hansard.parliament.uk/Commons/2017-03-29/debates/A6DFE4A0-6AB1-4B71-BF25-376F52AF3300/Article50

[9] https://www.kcl.ac.uk/law/tli/about/Baudenbacher-Kings-College-13-10-16.pdf

[10] *Commission v Ireland* (C-13/00) [2002] E.C.R. I-2943; [2002] 2 C.M.L.R. 10 at [14], [15] and [20]; and *Commission v Ireland* (C-459/03) [2006] E.C.R. I-4635; [2006] 2 C.M.L.R. 59 at [83]-[84].

interpret the provisions of the Agreement falls to the CJEU in cases concerning EU Member States.[11] Moreover, the CJEU held that unconditional and precise provisions of the EEA Agreement had direct effect under EU law.[12]

31. The argument that the Agreement is an integral part of EU law can also be derived directly from the Agreement itself. The definition of the Agreement's Contracting Parties in article 2(c) reflects the nature of the Agreement as a mixed agreement under EU law, where competence is shared between the EU and the Member States. The article 2(c) definition includes the EU and the Member States, or the EU, or the Member States, as to be determined from the relevant provision and the respective competences of the EC and Member States. Tynes and Haugsdal conclude this argument that:

> "*…it may be inferred that rights and obligations deriving from the EEA Agreement are a matter of EU law as regards the EU Member States. If the UK leaves the EU and ceases to apply EU law, the EEA Agreement will therefore suffer the same fate. Rights and obligations derived from the EEA Agreement as an integral part of EU law would in that case no longer apply*."[13]

32. A secondary argument is the institutional set-up of the Agreement as described above is clearly predicated upon Contracting Parties being either EEA EFTA states or EU member states. For instance, decisions in the EEA Joint Committee are taken by the EEA EFTA states, speaking with one voice, and the Commission representing the EU and its Member States. In practical terms it may be said that the EEA Agreement functions as a bilateral treaty between two trading blocs, not between individual Contracting Parties.

33. Thirdly, when concluding the EEA in the late 1980s and early 1990s the EU initially Commission argued, as a matter of EU law, that it had sole competence to enter into the Agreement. Given that the core element of the Agreement is the extension of the internal market to the EEA EFTA states, adopting an essential part of internal market rules already established by EU legislation, the participation of the Member States as signatories to the Agreement seems "*at least partly political in nature*."[14] It was only established at a very late stage of negotiations that Member States would be Contracting Parties to the Agreement in their own right. The suggestion appears to be

[11] *Demirel v Gmünd* (12/86) [1987] E.C.R. 3719; *Commission v Ireland* (C-13/00) [2002] E.C.R. I-2943 at [20]; and *Commission v Ireland* (C-459/03) [2006] E.C.R. I-4635 at [121].
[12] *Opel Austria GmbH v Council* (T-115/94) [1997] E.C.R. II-39; [1997] 1 C.M.L.R. 733 at [102].
[13] Tynes and Haugsdal, 762.
[14] Tynes and Haugsdal, 762.

that less weight legally should be placed on the individual Contracting Parties than would normally be the case for an international agreement.

34. Fourthly, article 126(1) states: "*The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.*" Post-Brexit, the UK will not be a member of the European Economic Community (now the EU) and the UK isn't Iceland, Liechtenstein or Norway. The Agreement will therefore prima facie cease to apply in the territories of the UK upon withdrawal from the EU.

35. If any one of the above arguments is correct the UK, as a matter of law, withdraws from the Agreement and the territory of the EEA when it formally withdraws from the EU.

Argument 2: The UK will remain bound by the provisions of the Agreement addressed to it as a Contracting Party

36. The alternative argument is stated by Professor George Yarrow in his paper *Brexit and the Single Market*. His central thesis is that the UK's withdrawal from the EU does not necessarily imply its withdrawal from the Agreement. This is supported by a number of arguments that can broadly be divided into five strands.

37. First, there is no provision in the Agreement for the termination of Contracting Party status other than by means of voluntary withdrawal under article 127. To allow withdrawal from the Agreement by any other means would render that article empty of purpose. This cannot have been the intention of any of the original signatories to the agreement.

38. Secondly, article 126(1) does not limit the geographic scope of the EEA '*only*' to the EU member states and the EFTA states. Inferring or implying this crucial '*only*' into the article is difficult. Moreover, the EU's broad policy goals in the period 1989-1992 were to bring countries together, not to create new barriers to participation in the Single Market. Without the word '*only*' article 126(1) is simply descriptive, but this does not render it worthless. It serves a specific additive function. A more comprehensive analysis of article 126(1) can be found in the Annex to *Brexit and the Single Market*.

39. Thirdly, international law is understandably conservative in maintaining the rights and obligations of parties to international treaties and agreements; hence the principle

of *pacta sunt servanda* (agreements must be kept) at article 26 of the Vienna Convention on the Law of Treaties ("VCLT").

40. Fourthly, there are no provisions in the Agreement that restrict Contracting Party status exclusively to member states of the EU and members of EFTA. On the contrary, the list of Contracting Parties provided at the start of the Agreement, including the UK, is explicit.

41. Fifthly, article 31(1) of the VCLT states: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*" The aim of the Agreement is set out in article 1(1): "*The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties...*" [My emphasis].

42. Given the Agreement's stated aim, or object and purpose in the language of the VCLT, of continuously strengthening trade and economic relations between the Contracting Parties, any ambiguity must be resolved in favour of that aim. It is difficult to see how the act of excluding the UK from the EEA would promote such an object.

43. The UK thus retains Contracting Party status to the Agreement even after it loses EU member state status, remaining bound by the relevant provisions addressed to the Contracting Parties.

When law and politics collide

44. Tynes and Haugsdal's core argument is that the rights and obligations deriving from the EEA Agreement are a matter of EU law for EU member states. That is undoubtedly correct. While the UK is an EU member state the Agreement applies as a matter of EU law. It naturally follows that, after withdrawing from the EU, the Agreement will not apply to the UK as a matter of EU law. But that is not the same as saying that it will not apply at all – the EU law-ness of the Agreement will fall away, but the underlying public international law provisions of the Agreement will still apply. To put it another way, there exists a public international law base layer to the Agreement, applicable to all Contracting Parties, on top of which the two separate, distinct strands of EFTA and EU law rest side-by-side.

45. Their second argument, that the institutional set-up of the Agreement is predicated upon Contracting Parties being either EEA EFTA states or EU member states, is also descriptively correct. This does not prevent the legal nature of the Agreement from conferring rights and duties upon Contracting Parties.

46. Their third argument, that less weight should be afforded to the inclusion of all the separate Contracting Parties as signatories to the Agreement because they only appear to have been added at a late stage as part of a political compromise, also fails. When the Contracting Parties were added as signatories is irrelevant. What matters is that they signed the Agreement as independent parties. Per article 26 of the VCLT: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*"

47. Their fourth argument, that article 126 limits the geographic scope of the Agreement only to EC member states or EFTA states, also fails. First, as outlined by Yarrow, the word 'only' is not included in the article and cannot be implied or inferred. Secondly, such an 'exclusionary' interpretation of article 126 would ignore the VCLT. Article 29 of the VCLT addresses the territorial scope of treaties and states: "*Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.*" There is thus a burden of proof to be discharged by anyone arguing that an ambitious exclusionary interpretation of article 126 overrides the unambiguous inclusion of the UK as a contracting party to the agreement. No reasoning yet put forward can bear that burden.

48. Thus, as a matter of legal interpretation, Professor Yarrow's arguments are to be preferred. The implications of this are considerable, not least because they could result in the UK remaining a Contracting Party to the Agreement against her Government's will. It is thus unlikely that his conclusions will necessarily follow. Two arguments in particular appear fatal to his conclusion that the UK will retain Contracting Party status after withdrawal from the EU.

49. First, political realities have overtaken pure legalities. A political consensus appears to have been reached that regardless of the precise wording of the Agreement the UK will withdraw from the EEA when it leaves the EU. As described earlier, the UK government is adamant that this is the case. In this they are supported by Professor Carl Baudenbacher, the EFTA Secretariat and EFTA states, while the EU Commission and the EU member states appear content to let the UK propose its own solutions at this stage of negotiations.

50. This consensus by itself is enough to bring the UK's Contracting Party status to an end. Under article 54 of the VCLT a party can withdraw from a Treaty if it wishes to do so either via specific provision in the relevant Treaty (such as, article 127 of the Agreement) or unanimous consent of all the parties to the Treaty. It is also possible under article 60 VCLT for the other parties to the EEA to end the UK's participation in the Agreement if the UK was in material breach of the Agreement. It is arguable that failure to notify a withdrawal under article 127 would form such a material breach, though it should of course be noted that in such a situation article 60 would simply be achieving the UK's currently expressed desires. Finally, under article 62 VCLT a party may unilaterally withdraw from a treaty if there has been a fundamental change of circumstances with regard to those existing at the time of the conclusion of the a treaty that was not foreseen by the parties. It is arguable that the UK's withdrawal from the EU forms such a fundamental change. Any of these options could be invoked to enable the UK's withdrawal from the Agreement without giving formal notice under article 127 of the Agreement.

51. A second argument is consequentialist in nature. It is highly uncertain how the post-Brexit situation where the UK retains Contracting Party status to the Agreement would function practically. While as a mere legal formality the UK could remain a nominal party to the EEA, this would be without substance. The UK would not participate in either the Joint Committee and the EEA Council decision-making institutions, no surveillance by either the EFTA Surveillance Authority or the Commission would take place, and no access to either the CJEU or EFTA Court would be available. This would be politically unacceptable to both the UK and all the other Contracting Parties, as well as legally unworkable. While under Yarrow's argument the Agreement may theoretically continue to convey rights and duties to individuals and enterprises, as described earlier, it will be unclear how to legally make respective claims. Such legal uncertainty would be unacceptable. If the exact letter of the Agreement has to be bent to avoid such consequences, then that is what is likely to occur.

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