

## **ABSTRACT**

Following UK's decision to withdraw from the European Union, the question on UK's future relationship with the EU, and especially its possible continuing access to the single market, became one of the main focus points of the whole Brexit debate. The EEA Agreement extends the single market of the EU to the three EEA-EFTA States of Iceland, Norway and Liechtenstein. The UK is currently a Contracting Party to the EEA Agreement in its capacity as a Member States of the EU. However, following UK's withdrawal from the EU the question arises what consequences it will entail for the EEA Agreement? What options does the UK face concerning its Contracting Party Status to the Agreement? Can the UK retain its Contracting Party Status even after formally withdrawing from the EU?

This paper examines the three legal options facing the UK concerning its future participation in the EEA Agreement. These options are: 1) The UK chooses to invoke the withdrawal procedure of Article 127 EEA and formally withdraw from the EEA Agreement; 2) the UK chooses not to invoke Article 127 EEA and; 3) the UK chooses to remain a Contracting Party to the EEA Agreement. The paper provides an overall assessment of these option by examining the legal processes envisaged both in EU law and EEA law, and the relationship between the two legal orders. Furthermore, the relevance of public international law in this regard is examined.

However, the main focus point will be on option two, and the main research question that this paper examines, which is whether the UK can retain its Contracting Party Status to the EEA Agreement post-Brexit. Arguments put forward by legal scholars who argue that the UK can retain its Contracting Party Status are examined, along with arguments that support the opposing view. In addition, the author of this paper will provide his own assessment and view of these arguments in order to definitely answer the main research question.

A lot of literature exists on the withdrawal process of Article 50 TEU, however, less has been written about the consequences of Brexit on the EEA Agreement, and in particular the legal options facing the UK concerning its possible future participation in the Agreement. This paper provides an overall examination of the most important legal questions concerning UK's possible continuing participation in the EEA Agreement, post-Brexit.

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## LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
DWA	Draft Withdrawal Agreement
EC	European Community
EC Treaty	European Community Treaty
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EFTA	European Free Trade Association
EFTA MPC	Committee of Members of Parliament of the EFTA States
EFTA SC	EFTA Standing Committee
ESA	EFTA Surveillance Authority
EU	European Union
EURATOM	European Atomic Energy Community
ICJ	International Court of Justice
ILC	International Law Commission
OECD	The Organisation for Economic Co-operation and Development
OEEC	The Organisation for European Economic Co-operation
SC Agreement	Surveillance and Court Agreement
TEEC	Treaty establishing the European Economic Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

## **Part I – Introduction and historical background**

### **1 Introduction**

In accordance with the powers granted to it by the Member States, the EU has concluded over one-thousand external agreements with other countries or organisation, ranging from agreements on very specific matters such as short-stay visa waivers, air transport and protection of classified information to complex trade agreements covering wide range of activities. The EEA Agreement is one of EU's most comprehensive free trade agreement extending the single market of the EU to the three EEA-EFTA States of Iceland, Norway and Liechtenstein. The objective of the Agreement is to “[strengthen] trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to [create] a homogeneous European Economic Area”.<sup>1</sup>

Following the decision of the UK electorate to withdraw from the EU, the question on UK's future relationship with Europe became one of the main focus points of the Brexit debate. While many voted to leave in order to withdraw, not only from the EU but also from the internal market, others wanted the UK to stay in the single market either as an EU Member State or as a third party. Centred around this discussion is what trade model the UK Government can rely on in its negotiations on the future relationship with the EU. In that regard mainly five models have been mentioned. First is the EEA Agreement, or the “Norway model” as it is known in the Brexit debate. The Norway model is the most comprehensive of the five models and would allow the UK to stay in the single market. Second is the “Swiss model”, a model governed by series of bilateral treaties with the EU covering some areas of the internal market while excluding others, such as limitations for the banking sector. Third is the “Turkish model”. The Turkish model does not contain a free trade agreement, but Turkey has concluded a customs union agreement with the EU, thereby abolishing tariffs and quotas on industrial goods exported to the EU. Fourth is the “Canada model”. The EU and Canada have negotiated a free trade agreement that has not yet come into force. The Agreement eliminates most tariffs on goods but excludes some sensitive food items. Furthermore, only parts of the service sector are covered by the Agreement. Fifth is the “WTO model”, which does not cover any free trade agreements. The World Trade Organization (WTO) regime provides that each member must grant all other WTO members the same “most favoured nation” market access. This means custom checks, tariffs and other regulatory barriers. Both the EU and the UK are a part of the

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<sup>1</sup> See Article 1 EEA.

WTO, and therefore if no deal were to be reached between the two on a future trade deal the default position would be the WTO model.

It is perhaps not surprising that the Brexit debate has, for the most part, evolved around future trade between the EU and the UK and especially UK's possible access to the single market, post-Brexit. The stakes for individuals and market operators on both sides of the English Channel cannot be overstressed. The EU is UK's largest trading partner, where UK's exports to the EU was £236 billion in 2016, amounting to 43% of all UK's exports and UK imports from the EU was £318 billion in 2016, amounting to 54% of all UK imports.<sup>2</sup> Furthermore, there are around three million EU citizens living in the UK representing about 4.6% of UK's population, while about 1.2 million UK citizens live in other EU countries.<sup>3</sup> These citizens have jobs, careers, children, spouses, homes, properties, businesses and many other obligations in their host countries. What will happen to them? Will they be able to stay in their host countries? Will they enjoy the same rights as they have done for the past couple of years?

However, it is not only the UK and the EU Member States that have a big stake in the future relationship between the UK and the EU. Through the EEA Agreement the three EEA-EFTA States of Iceland, Norway and Liechtenstein have access to the internal market of the EU, and therefore Brexit could have a huge impact on their citizens and market operators as well. For example, more than two-thousand Icelandic citizens live in the UK and Iceland's exports in goods to the UK were 73 billion ISK amounting to 12% of Iceland's total exports in goods in 2015.<sup>4</sup> Furthermore, the UK is Norway's most important export market accounting for about 21% of Norway's total exports in 2016.<sup>5</sup> Will the agreement on the future relationship between the UK and the EU ensure that EEA-EFTA citizens will enjoy the same rights in the UK as EU citizens? Will the same apply to trade in goods and services? Or the internal market as a whole?

Due to this uncertainty and the complicated political situation in the UK, which has only added fuel on the fire, it is not surprising that the debate on UK's possible participation in the EEA Agreement post-Brexit has been gaining more attention. The EEA Agreement provides an established and functioning framework for free trade between the EEA Contracting Parties.

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<sup>2</sup> Statistics on UK-EU trade, Briefing Paper Number 7851, House of Commons Library, December 2017.

<sup>3</sup> International Migration, International migrant stock 2015, United Nations Department of Economic and Social Affairs and Population by Country of Birth and Nationality Report, Office for National Statistics, August 2015.

<sup>4</sup> *Skýrsla Guðlaugs Þórs Þórðarsonar utanríkisráðherra um utanríkis- og alþjóðamál*. Utanríkisráðuneytið, Reykjavík 2017.

<sup>5</sup> See statistics provided by the World Integrated Trade Solution, available at: <https://wits.worldbank.org/Default.aspx?lang=en>

It is the only current model that would allow the UK to remain in the single market while at the same time withdrawing from the EU, thereby minimizing the negative impact on trade.

The UK is currently a Contracting Party to the EEA Agreement in its capacity as a Member States of the EU. However, following UK's withdrawal from the EU the question arises what consequences it will entail for the EEA Agreement? What options does the UK face concerning its Contracting Party Status to the Agreement? Can the UK retain its Contracting Party Status even after formally withdrawing from the EU? And if so what amendments will have to be made to the Agreement to accommodate such a situation?

This paper will examine the three legal options that the UK faces concerning its future participation in the EEA Agreement following its withdrawal from the EU. These options are: 1) The UK chooses to invoke the withdrawal procedure of Article 127 EEA and formally withdraw from the EEA Agreement; 2) The UK chooses not to invoke Article 127 EEA and; 3) the UK chooses to remain a Contracting Party to the EEA Agreement.

The aim is to provide an overall assessment of these option by examining the legal processes envisaged both in EU law and EEA law and the relationship between the two legal orders. Furthermore, the relevance of public international law on EU/EEA law will be examined. A lot of literature exists on the withdrawal process of Article 50 TEU, however, less has been written about the consequences of Brexit on the EEA Agreement and in particular the legal options facing the UK concerning its possible future participation in the Agreement. This paper aims to answer some of the legal questions concerning UK's possible participation in the EEA Agreement, post-Brexit

There is a consensus both in Brussels and London that the EEA Agreement will automatically cease to apply to the UK once it formally withdraws from the EU. Furthermore, this consensus is supported by the majority of legal scholars especially leading scholars of EEA law. However, some disagree and argue that the UK could in theory retain its Contracting Party Status to the EEA Agreement post-Brexit. This paper will examine the arguments put forward by those who argue for UK's continuing Contracting Party Status and the author will give his own assessment of these arguments. However, due to the rather limited number of legal scholars arguing that the UK can retain its Contracting Party Status to the Agreement, post-Brexit, the research mainly focuses on the arguments put forward by the following legal experts: Ulrich G. Schroeter, Heinrich Nemeček and Gorge Yarrow.<sup>6</sup> In addition, the author will attempt to

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<sup>6</sup> Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. George Yarrow: "Brexit and the Single Market".

provide additional arguments that support UK's continuing Contracting Party Status to the EEA Agreement as well as arguments that support the opposing view.

The main research question that this paper will examine is whether the UK can retain its Contracting Party Status to the EEA Agreement post-Brexit? In addition, this paper will explore the following questions: Is the UK under an obligation to trigger Article 127 EEA and formally withdraw from the EEA Agreement? Is public international law relevant concerning UK's possible continuing participation in the EEA Agreement?

The methodology followed during this research is largely descriptive, by examining the legal issues based on the statutory provisions of the EU treaties and the EEA Agreement. However, where the descriptive approach fails to shed a proper light on the law as it stands, the author turns to an analytical approach, examining the writings of qualified legal scholars and in addition providing his own views and opinions. While the research mainly focuses on the primary law of the EU, statutory provisions of the EEA Agreement and the writings of qualified scholars, judgments of the CJEU and the EFTA Court will also shortly be examined in order to emphasize the special nature of the two legal orders.

As to the structure of the paper it is divided into five parts. Part I provides an overview of the historical background of the EEA Agreement and the relationship between the EU and EFTA along with a short history of Brexit. Due to the misconception that exists, not only among ordinary citizens but also among lawyers, a historical knowledge is necessary in order to understand the complex relationship between the EU legal order and the EEA legal order and to gain a better insight into both the legal and political complexities that led to Brexit.

Part II will examine the theoretical possibility where the UK decides to withdraw from the EEA Agreement in accordance with the withdrawal process found in Article 127 EEA. It will examine the legal process of withdrawing from the Agreement and its relationship with the withdrawal process of the EU. Furthermore, it will take a short look at the Brexit negotiations, that are currently underway, and their possible consequences for the EEA Agreement. Finally, Part II will examine whether the UK is under an obligation to formally trigger the withdrawal process of the Agreement following its departure from the EU.

Part III examines the possibility that the UK decides not to invoke Article 127 EEA and the consequences that it might entail. It will be the focus point of the main research question of this paper which is whether the UK automatically loses its Contracting Party Status to the EEA Agreement once it formally withdraws from the EU. In order to answer the question arguments for and against UK's continuing Contracting Party Status will be examined and the author will give his own assessment of these arguments. An overall examination of the structure of the

EEA Agreement will be made and whether that structure can be reconciled with the post-Brexit reality of a Contracting Party that is neither a Member State of the EU nor EFTA. Furthermore, Part III will examine the relevance of international law in this debate and whether the UK can rely on provisions of the VCLT to withdraw from the Agreement in case of its failure to trigger Article 127 EEA. Due to the uncertainty and lack of precedence that surrounds the whole process of UK's withdrawal from the EU, it has to be borne in mind that Part III deals with very hypothetical scenarios that in reality might be more of a political issue rather than a legal one.

Part IV examines the possible situation where the UK wishes to remain a Contracting Party to the EEA Agreement and the necessary modification that would have to be made in order to allow the UK to retain its status post-Brexit. It will not only examine the necessary amendments to the main text of the EEA Agreement but also relevant Agreements such as the SC Agreement, the Agreement on a Standing Committee of the EFTA States and the Agreement on a Committee of Members of Parliament of the EFTA States. Part IV is not meant to provide an exhaustive list of the necessary amendments but will touch upon the most obvious and important ones.

Finally, Part V will summarize the main conclusions of this paper and the author will provide his own thoughts on the current and future issues of Brexit and the EEA Agreement.

## **2 The historical background of the EEA Agreement**

### **2.1 Economic development in Europe – From WWII to the creation of EFTA**

At the end of the second World War large parts of Europe lay in ruin and a massive rebuilding effort was needed to bring Europe back on its feet. In an effort to do so the American government initiated a plan to aid Europe's reconstruction, the so-called Marshall Plan, named after the then US Secretary of State. In 1948 the Organisation for European Economic Co-operation (OEEC) was founded in order to administer and implement the Marshall Plan. Most of the Western European countries decided to participate in OEEC while the Soviet Union and number of its neighbouring countries decided to not to do so.

Within the framework of the OEEC a number of different ideas were discussed on the future development and cooperation in Europe, which in 1951 lead to the treaty establishing the European Coal and Steel Community (ECSC), with the aim of creating a common market for coal and steel among its Member States. The second step in the objective of free trade was to establish a customs union and along with it a Community on the non-military development of

atomic energy.<sup>7</sup> This led to the signing of the treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM) in Rome in 1957. While discussions on the creation of the EEC took place other members of the OEEC discussed the idea of creating a free trade area in Western Europe which led to the creation of an intergovernmental Committee of Ministers which were given the task of negotiating a free trade agreement, however these negotiations ended in vain 1958, mainly because of the political differences between the UK and France.<sup>8</sup>

With the initiative of the UK the other OEEC countries started to examine the possibility for a close cooperation based on the idea of forming a free trade agreement in order to counterbalance any discrimination by the EEC.<sup>9</sup> This led to the Convention establishing EFTA, signed in Stockholm on 20 November 1959 and entered into force on 3 May 1960. The seven founding State of EFTA were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK.

After the ECSC came into being in 1952, the EEC in 1958, EFTA in 1960 and with the job of rebuilding Europe effectively done, the OEEC was transformed into a global organisation today known as the Organisation for Economic Co-operation and Development (OECD).

The EFTA Convention mainly provided for the abolition and prohibition of tariffs, custom duties and quantitative restrictions on trade, along with provisions regarding the prohibition of State aid. The abolition of tariffs and quantitative restrictions on industrial products took place in parallel with similar process taking place in the EEC.<sup>10</sup>

At the time of creation of EFTA Finland had expressed interest in participating in free trade with the EFTA countries, which resulted in an association agreement between Finland and the Member States of EFTA. This agreement essentially provided for the same rights and obligation between the EFTA States and Finland as existed between the EFTA States themselves.<sup>11</sup> This association agreement lasted until 1 January 1986 when Finland officially became an EFTA member. Iceland joined EFTA on 1 March 1970 and in 1973 the UK and Denmark left EFTA and became members of the EEC, as did Portugal in 1986. Liechtenstein became a full member of EFTA in 1991, but ever since the EFTA Convention came into force in 1960 Liechtenstein

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<sup>7</sup> Kåre Bryn and Guðmundur Einarsson: *EFTA 1960-2010 – Elements of 50 Years of European History*, p. 15.

<sup>8</sup> Kåre Bryn and Guðmundur Einarsson: *EFTA 1960-2010 – Elements of 50 Years of European History*, p. 16.

<sup>9</sup> Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 8.

<sup>10</sup> Kåre Bryn and Guðmundur Einarsson: *EFTA 1960-2010 – Elements of 50 Years of European History*, p. 17 and Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 9-10.

<sup>11</sup> Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 10.

had participated in EFTA under a particular protocol to which its interests had been represented by Switzerland.<sup>12</sup>

## **2.2 The relationship between EFTA and the EEC**

From the beginning the EFTA countries sought a solution to the problem of the economic division that maintaining two trading blocks in Western Europe entailed. To this end various attempts were made by EFTA in order to reach an agreement with the EEC on a closer cooperation between the two trading blocks. In 1961 the UK, Denmark and Norway applied for a membership of the EEC, however due to the hostile attitude of the President of France, Charles de Gaulle, towards UK's possible accession to the Communities, the negotiations were suspended in 1963. In 1967 the UK attempted once again to accede to the EEC, however, the application was again rejected by President Charles de Gaulle. It was not until de Gaulle was superseded by Georges Pompidou as President of France in 1969 that the EEC opened up towards the EFTA Countries.

At a summit meeting of the heads of State of the EEC in The Hague in December 1969 the decision was made to open up the Community for enlargement. On June 1970 negotiations began on Denmark's, Ireland's, Norway's and UK's accession to the EEC. Denmark, Ireland and the UK signed association agreements with the Community on 1 January 1973, while in Norway the majority of the electorate rejected a membership to the Community.<sup>13</sup>

At a similar time as the accession negotiation with the EEC took place the remaining EFTA Countries sought to negotiate a free trade agreement with the EEC. These negotiations ended with the signing of free trade agreements in 1972 between the EEC and Austria, Iceland, Portugal, Sweden and Switzerland, while free trade agreements with Norway and Finland were signed in 1973. Under these free trade agreements import duties were gradually reduced and abolished. These agreements were considered a major success, not only because they were successful in abolishing duties and other barriers to trade but also because they were a major step in bridging the divide between the two major trading blocs of Western Europe.<sup>14</sup>

Following the successful implementation of these trade agreements between the EFTA States and the EEC, the focus shifted towards non-tariff barriers which resulted in the first

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<sup>12</sup> See Kåre Bryn and Guðmundur Einarsson: *EFTA 1960-2010 – Elements of 50 Years of European History*, p. 22.

<sup>13</sup> In a consultative referendum held in September 1972, 53.% of the electorate opted against Norway acceding to the EEC.

<sup>14</sup> See Kåre Bryn and Guðmundur Einarsson: *EFTA 1960-2010 – Elements of 50 Years of European History*, p. 20 and Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 15.

Ministerial meeting between the two trading blocs which took place in Luxembourg on 9 April 1984. Following the meeting a declaration was drawn up declaring the will on both sides to further enhance cooperation in economic matters. The declaration stressed the importance of the free trade agreements concluded between the Community and the EFTA Countries which have established “the largest system of free trade in the world, within which one quarter of world trade takes place, with over 300 million consumers, and which future enlargement of the Community will be sure to widen further.”<sup>15</sup> The declaration furthermore stressed the importance of strengthening cooperation “with the aim of creating a dynamic European economic space” by continuing to oppose protectionist measures and improve the free circulation of industrial goods, particularly in the areas of “harmonisation of standards, elimination of technical barriers, simplification of border facilities and rules of origin, elimination of unfair trading practices, state aid contrary to the free trade agreements and access to government procurement.”<sup>16</sup>

In the aftermath of the Luxembourg meeting the EEC started its work on strengthening its internal economic integration with the creation of a Single European Market with free movement of goods, services, capitals and persons by the end of 1992. This created new challenges for the EFTA States since they would run the risk of being left behind while the EEC took the next step in its economic integration, unless they were willing to take similar steps to ensure parallel development with the EEC.<sup>17</sup> In January 1989, the President of the European Commission, Jacques Delors, suggested “a new, more structured partnership with common decision-making and administrative institutions” with the EFTA Countries that would rest on the “two pillars” of the EEC and EFTA.<sup>18</sup> The EFTA Countries reacted less than two months later where they welcomed the initiative and expressed their desire that “negotiations would lead to the fullest possible realisation of free movement of goods, services, capital and persons, with the aim of creating a dynamic and homogeneous European Economic Space.”<sup>19</sup> Following a fact-finding and exploratory talks the formal negotiation on a European Economic Area (EEA) started in June 1990.

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<sup>15</sup> See Joint Declaration: Luxembourg: Ministerial meeting between EFTA countries and the EC and its Member States.

<sup>16</sup> See Joint Declaration: *Ministerial meeting between EFTA countries and the EC and its Member States*.

<sup>17</sup> Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 17.

<sup>18</sup> Jacques Delors: Statement on the broad lines of Commission Policy, presented by Jacques Delors, President of the Commission, to the European Parliament and reply to the ensuing Parliamentary debate

<sup>19</sup> Declaration: Meeting of EFTA heads of Government Oslo, 14 and 15 March 1989.

### 2.3 The negotiations of the EEA Agreement

Early on in the negotiations two key issues emerged. First was the issue on what parts of the EC *acquis communautaire* were to be incorporated into the Agreement, but the EFTA Countries wanted derogations from parts of the *acquis*. Second was the issue on the institutional structure of the EEA, but the EEC wanted to safe-guard its decision-making autonomy. In the beginning of 1991 these issues were largely resolved when the negotiators agreed on an EFTA surveillance mechanism and an independent EEA Court.<sup>20</sup> In October 1991 the negotiations were finalized when the remaining issues on trade in fish, a financial mechanism and road transit through the Alpine countries were settled. However, before the Agreement could be signed an opinion from the CJEU was needed concerning the compatibility of the judicial supervision mechanism of the Agreement with the EEC Treaty. In Opinion 1/91 delivered on 14 December 1991 the CJEU concluded that the judicial supervision mechanism proposed in the Agreement was incompatible with the EEC Treaty.<sup>21</sup> Despite this blow the negotiations resumed and the parties agreed to a new judicial mechanism in February of 1992. The new mechanism entailed that a new separate EFTA Court were to be established which would have the corresponding judicial powers over the EFTA States as the CJEU had over the EC Member States. Furthermore, provisions were added to the Agreement to strengthen legal homogeneity and surveillance.<sup>22</sup> The new mechanism was approved by the CJEU in Opinion 1/92 and paved the way for the Agreement to be officially signed. The EEA Agreement was signed on 2 May 1992 along with the Surveillance and Court Agreement (SC Agreement).

Following the signing of the Agreement preparations commenced concerning implementation of the Agreement including setting up the EFTA Court and the EFTA Surveillance Authority (ESA). Initially the Agreement was meant to enter into force on 1 January 1993, however following the negative referendum in Switzerland adjustment had to be made.<sup>23</sup> In March 1993 an Adjusting Protocol was agreed upon which essentially erased all references to Switzerland thus allowing the Agreement to enter into force. The EEA Agreement entered into force on 1 January 1994.

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<sup>20</sup> Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 28.

<sup>21</sup> CJEU Opinion 1/91 [1991] ECR I-6079. Opinion regarding the Draft Agreement between the European Community and the European Free Trade Association relating to the creation of the European Economic Area, Decision of 14 December 1991 [1992] I CMLR 245.

<sup>22</sup> See Kåre Bryn and Guðmundur Einarsson: *EFTA 1960-2010 – Elements of 50 Years of European History*, p. 22-23 and Sven Norberg and Martin Johansson in Carl Baudenbacher: *The Handbook of EEA Law*, p. 30.

<sup>23</sup> The Swiss electorate rejected the EEA Agreement with 50.3% of the vote.

## 2.4 The EEA Agreement after entering into force

Before the EEA Agreement entered into force, four EFTA States had already initiated accession negotiations with the EU. While the electorate in Austria, Finland and Sweden voted in favour of acceding to the EU, the electorate in Norway rejected accession to the EU.<sup>24</sup> This reduced the total number of EEA-EFTA States from five to two until 1 May 1995 when Liechtenstein acceded to the Agreement, leaving the total number of EEA-EFTA States to the current three States of Iceland, Norway and Liechtenstein.

While Switzerland rejected the EEA Agreement it remains a member of EFTA. Following the conclusion of the Adjustment Protocol to the EEA Agreement Article 128(1) EEA provided that Switzerland may accede to the Agreement if it so wishes, however Switzerland decided to go in another direction and has created a structure of bilateral agreements with the EU which mainly cover areas of the internal market.

Since the Agreement came into force the EU has gone through some major changes both concerning its internal structure and primary law and due to the large expansion in numbers of Member States, mainly to the east following the collapse of the Soviet Union. Article 128 EEA provides that any new State becoming member of the EU shall apply to become a party to the EEA Agreement. This has led to the simultaneous expansion of the Agreement, first in 2004 when ten new countries acceded to the EU and as a consequence the EEA Agreement.<sup>25</sup> Second in 2007 when Romania and Bulgaria became EU member States and third in 2013 when Croatia became an EU member State, resulting in the current total of thirty-one EEA States. Furthermore, the EU treaties have gone through four major developments since the EEA Agreement was negotiated, first with the treaty of Maastricht in 1992, second with the treaty of Amsterdam in 1999, third with the treaty of Nice in 2003 and lastly the treaty of Lisbon which entered into force in 2009. These developments within the EU internal order are a cause of concern for the EEA/EFTA States due to the fact that main text of the EEA Agreement has not evolved with these developments and the increasing concern over the democratic deficit that it may entail.<sup>26</sup>

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<sup>24</sup> In Austria 66.6% voted in favour, in Finland 56.9% and in Sweden 52.3%. In Norway 52.8% of the electorate rejected the countries accession to the EU.

<sup>25</sup> These were Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

<sup>26</sup> For more on this issue see for example: Eyvindur G. Gunnarsson og Stefán Már Stefánsson: "EFTA-dómstóllinn í ljósi lýðræðishalla", Vefrit Úlfjóts, available at: <https://ulfjotur.com/2018/04/10/efta-domstollinn-i-ljosi-lydraedishalla/> and M. Elvira Mendez-Pinedo: „Lýðræðishallinn í EES“, available at: <https://www.mbl.is/greinasafn/grein/1269414/>.

## 3 Brexit

### 3.1 The history behind Brexit

The history behind Brexit is both too long and complex to be comprehensively recounted in this introductory chapter. However, the chapter will examine, in short, some of the events that led to the Brexit referendum.

A large part of the British public has always been sceptic about the countries membership in the EU, even before the UK acceded to the EC in 1973. As was noted above the President of France, Charles de Gaulle, stood in the way of UK's accession to the EC in 1963 because he perceived that UK's commitment did not remain with Europe but with the Commonwealth and more importantly the US.<sup>27</sup> Only two years after the UK acceded to the EU, the UK government sought to renegotiate its terms of membership with the Community following which it held a referendum where the majority of the UK electorate choose to remain in the EC.<sup>28</sup>

In the 1980's UK's hostility towards the EC once again came into light when the then Conservative Prime Minister, Margaret Thatcher, sought and succeeded in reducing UK's payment into the budget of the Community. At a similar time, the scepticism in the Labour Party towards the EC diminished after it introduced regulation to protect social rights of workers. In the 1990's the Conservative party was split in its view towards the EU, Margret Thatcher who had increasingly become more and more sceptic towards the EU was pushed aside which paved the way for Tony Blair to win a landslide victory in the 1997 general election. Tony Blair who was strongly in favour of the EU worked hard to strengthen UK's ties with the EU while at the same time the Eurosceptic wing of the Conservative party grew stronger.

Following thirteen years of a Labour Party government, David Cameron managed to lead the Conservatives into power in 2010. Resentment and criticism towards the EU had grown in the aftermath of the 2008 financial crisis and the EU's handling of the eurozone crisis and the escalating migrant crisis. Furthermore, the UK Independence Party had been gaining a lot of attention and support in the UK due to its hard stance against the EU and its anti-immigration rhetoric. In 2013 David Cameron outlined in a speech his vision on the future of UK's membership in the EU.<sup>29</sup> In the speech he shared his plans for the upcoming 2015 general election, to campaign on platform of renegotiating a new settlement deal with the EU following a referendum on UK's continuing membership in the EU. Following the Conservative victory

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<sup>27</sup> Charles de Gaulle: Press Conference held by General de Gaulle (14 January 1963).

<sup>28</sup> The referendum was held 5 June 1975 where 67.23% of the electorate voted to stay in the EC while 32.77 voted against.

<sup>29</sup> David Cameron's Speech: The Danger Is That Europe Will Fail.

in the 2015 general elections, David Cameron managed to renegotiate UK's membership with the EU, a deal which included an emergency break mechanism on work benefits for new EU immigrants and the exemption for the UK from the goal of the EU to create an "ever closer Union". Following the conclusion of the renegotiations David Cameron announced that a referendum on UK's future membership in the EU would take place on 23 June 2016.

### **3.2 The Brexit referendum and its aftermath**

In a referendum held on 23 June 2016, 51.89% of UK's electorate voted in favour of leaving the European Union. The result came as quite a surprise, both in the UK and on mainland Europe, since majority of opinion polls leading to the referendum had predicted that the UK public would vote in favour of remaining in the EU. In the immediate aftermath of the referendum it became clear that neither side was fully prepared for the option of the UK leaving the EU. This was perhaps best crystalized in the *Miller* case, where the UK Supreme Court ruled that the UK Government could not start the process of withdrawing from the European Union, by notifying the European Council of its intention to do so in accordance with Article 50 TEU, without the prior authority of primary legislation from the UK Parliament. Even though the Miller case only concerned the constitutional legal order of the UK, it became symbolic for the legal complications and uncertainty that leaving the EU would entail.

Following the Miller case, the UK Parliament passed an act granting the UK Prime minister the power to formally trigger Article 50 TEU. Shortly after, in a letter dated 29 March 2017, the Prime Minister of the UK, Theresa May, informed the President of the European Council, Donald Tusk, of UK's intention to withdraw from the EU and thereby formally invoking Article 50 TEU.

Soon after, negotiations commenced on an agreement setting out the arrangements on UK's withdrawal from the EU in accordance with Article 50(2). As was to be expected the Brexit negotiations have dominated the news circle in Europe and especially in the UK. The political and legal complexity of the whole process cannot be overstated where uncertainty on EU citizens' rights in the UK and vice versa, on the Irish border problem and the Good Friday Agreement, on financial services and overall future trade between the EU and the UK looms over the continent.

However, a major step forward in the negotiations was taken in December of 2017 when the joint report from the negotiators of the EU and the UK Government was released setting out

the progress made on phase one of the negotiations.<sup>30</sup> Based on this report the European Commission released a draft withdrawal agreement (DWA) where it set out in legal terms the issues covered by the joint report.<sup>31</sup> While large parts of the DWA have been agreed to at negotiator's level by both sides, many important and heavily disputed issues remain unsolved, such as the Irish border issue, the dispute mechanism and the role of the CJEU and citizens' rights concerning EU nationals who arrive in the UK during the transition period. The most noticeable outcome of the DWA is perhaps the mostly agreed provisions concerning a transition or implementation period which starts when the final draft withdrawal agreement enters into force and is envisaged to end on 31 December 2020. The transition period entails that even though the UK officially leaves the EU on 29 March 2019, it will continue to abide by the EU Treaties, with some exception, until the end of the transition period, at which point it is envisaged that an agreement on the future relationship between the EU and the UK enters into force.<sup>32</sup>

In December 2017 EU leaders agreed that sufficient progress had been made concerning the first phase of the negotiations to allow it to move to phase two. Phase two of the negotiations relates to the transition and the framework for the future relationship between the EU and the UK. One of the most important aspects of the Brexit negotiations and the one that has perhaps gained the most attention surrounding the whole process, is the future relationship between the EU and the UK and especially what kind of a trade deal will be negotiated. Many articles and papers have been written setting out the possible options that the UK has on this issue ranging from comprehensive free trade agreements like the EEA Agreement to a customs union agreement like the EU has with Turkey. The negotiations between the UK and the EU, and the DWA will be further examined in Chapter five of Part II as they currently stand on 1 May 2018.

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<sup>30</sup> Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union. 8 December 2017, TF50 (2017) 19 –Commission to EU27.

<sup>31</sup> Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. 19 March 2018, TF50 (2018) 35 - Commission to EU27.

<sup>32</sup> See Articles 121-126 of the DWA.

## **Part II – The UK chooses to invoke Article 127 of the EEA Agreement**

### **1 Introduction**

Part II of this paper examines the option facing the UK concerning its Contracting Party Status to the EEA Agreement in the light of Brexit, which is to withdraw from the Agreement by invoking the withdrawal process of the Agreement found in Article 127 EEA. The current position of the UK Government is that there is no need to trigger the withdrawal procedure due to the consequences that the UK will automatically cease to be bound by the Agreement once it formally withdraws from the EU. Despite this position, Part II will examine the withdrawal procedure in light of UK's decision to trigger Article 127 EEA.

Chapter two will examine the legal process itself as it is described in Article 127 EEA and the consequences that is envisaged there. Chapter three will examine the provision in the light of its sister provision of Article 50 TEU and the relationship between the two provisions in the light of UK's withdrawal from the EU. Chapter four will examine whether it can be deduced from Article 127 EEA and the EU withdrawal process as a whole, that the UK is in fact under an obligation to formally trigger Article 127 EEA. Chapter five will examine the effects of the Brexit negotiations, that are currently underway, on the EEA Agreement with a focus on the DWA released by the European Commission on 28 February 2018. Finally, chapter six will summarize the main conclusions of this part.

### **2 The legal process of triggering Article 127 EEA**

Article 127 of the EEA Agreement is the only provision that provides for the possibility for a Contracting Party to unilaterally withdraw from the Agreement. The Article states:

Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties.

Immediately after the notification of the intended withdrawal, the other Contracting Parties shall convene a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement.

The requirements of withdrawal are quite straightforward. First of all, the withdrawing state simply has to give a written notice to the other Contracting Parties of the Agreement. The Contracting Parties are listed in the preamble of the EEA Agreement, so this notice would have to reach each of the parties listed there. The second requirement is that the withdrawing party

has to inform the other Contracting Parties of its intention to withdraw from the Agreement at least twelve months prior to the withdrawal taking effect. The twelve-month's precondition is simply a bare minimum, as can be seen from the wording of the provision, a withdrawing State can decide to give a longer notice of its intention to withdraw from the Agreement. No other requirements fall on the shoulders of the withdrawing State, but the second paragraph provides that the other Contracting Parties are to immediately convene a diplomatic conference in order to prepare for the necessary modification to the Agreement. In the case of the UK withdrawing from the Agreement, such modifications would mainly include erasing the UK from the list of Contracting Parties in the preamble of the Agreement and other modifications to the Protocols and Annexes of the Agreement as would deem necessary for the continuing smooth operation of the Agreement. However, due to the lack of precedence and the fact that the Agreement is silent on further details on such modifications, it is uncertain what exactly these modifications might entail. Whatever the necessary modifications are, it is very likely that they will have to be approved by all the Contracting Parties in accordance to their own constitutional requirements. This can be derived from the wording of Article 127 EEA which requires a diplomatic conference to be setup by all the other Contracting Parties.<sup>33</sup> However, if the necessary modifications were to be considered to fall under the exclusive competence of the EU in accordance with Article 3(2) TFEU, the modification agreement would not have to undergo a ratification process at the national level of the EU Member States.<sup>34</sup>

As simple as the timing of the withdrawal may seem it is in fact particularly important when it comes to a member state of the EU that wishes to withdraw from the Union, as is the case with the UK. In such a situation, a coordination between the EU withdrawal procedure (Article 50 TEU) and the EEA withdrawal procedure (Article 127 EEA) could be necessary in order to ensure the simultaneous withdrawal of the two treaties. That process will be further examined in the next chapter.

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<sup>33</sup> See Article 129(2) EEA which provides that the Agreement shall be ratified or approved by the Contracting Parties in accordance with their respective constitutional requirements.

<sup>34</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 141-142.

### **3 Article 127 EEA and its relationship with Article 50 TEU**

The withdrawal process found in Article 127 EEA is legally straightforward and in fact quite simple. However, the same cannot be said about a Member State withdrawing from the EU in accordance with Article 50 TEU, where paragraph two provides for the following withdrawal process:

A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

The difference between the two withdrawal procedures is rooted in the different level of integration of the EFTA States on the one hand and the EU Member States on the other. While membership of the EU requires considerable transfer of powers to the EU institutions, no formal transfer of powers is required of the EEA-EFTA States. Consequently, Article 50(2) provides that the EU and the withdrawing State shall negotiate and conclude an agreement on the conditions for withdrawal and “setting out the framework for its future relationship”, while Article 127 EEA simply provides that a Contracting Party can unilaterally withdraw without any negotiations taking place on the conditions of its withdrawal. Article 127 EEA solely requires that the remaining Contracting Parties “convene a diplomatic conference in order to envisage the necessary modifications” to the EEA Agreement.

However, the withdrawal process of the EEA Agreement is further complicated when a Contracting Party to the Agreement wishes to withdraw from the EU, as is the case with the UK. Since UK’s Contracting Party Status to the EEA Agreement seems conditional upon a being a Member State of the EU, a coordination between the two withdrawal procedures could be considered necessary in order to ensure the simultaneous withdrawal of the EEA Agreement and the EU Treaties.<sup>35</sup>

Article 50(3) TEU provides that the Treaties of the EU cease to apply to the withdrawing State from the date of entry of the withdrawal agreement, or when no such agreement has been

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<sup>35</sup> Christophe Hillion: “The UK withdrawal from the EU: Legal implications for Norway as party to the EEA Agreement”, p. 9.

made, two years after the withdrawing State has notified the European Council of its intention to withdraw from the EU. The European Council can, however, unanimously decide in an agreement with the withdrawing State to extend that period. The EU withdrawal process, therefore, provides for three possible withdrawal dates depending on the agreements reached between the UK and the EU or the European Council's unilateral decision to extend the two-year period.

In a letter dated 29 of March 2017, the Prime Minister of the UK notified the European Council of UK's intention to withdraw from the European Union in accordance with Article 50(2) TEU. The two-year period mentioned in Article 50(3) TEU, therefore, expires on 29 of March 2019 and the EU Treaties will cease to apply to the UK on that date unless a withdrawal agreement has been concluded setting out a later date of withdrawal or the European Council decides in an agreement with the UK to extend that period.

Such a withdrawal agreement could include the future of UK's participation in the EEA Agreement. The UK and the EU could agree on UK's continuing participation in the Agreement with amendments to accommodate the new reality of a Contracting Party that is not a member of the EU nor EFTA (unless the UK were to become a member of EFTA). Such amendments would have to be negotiated along with the EEA-EFTA Contracting Parties and would also have to include a decision on UK's participation in the EEA-EFTA organs, such as ESA and the EFTA Court. Furthermore, these amendments would require the approval of all the Contracting Parties to the Agreement, that is the EU and its Member States and the three EEA-EFTA States.

If it is the will of the UK to terminate its Contracting Party status under the EEA Agreement post-Brexit and ensure the smooth and simultaneous withdrawal from the EU and the EEA Agreement, the straightforward option would have been to inform the other Contracting Parties of its intention to withdraw no later than 29 of March 2018. In the case of the UK and the EU failing to conclude a withdrawal agreement and the negotiation period mentioned in Article 50(3) were not to be extended, such a notification would have ensured that the EEA Agreement ceased to apply to the UK when, and if, it formally withdraws from the EU on 29 of March 2019. By doing so the UK would have, once and for all, erased all doubts as to its Contracting Party Status to the Agreement post-Brexit. However, this date has already passed without the UK formally notifying the other Contracting Parties of its intention to withdraw from the Agreement.

Nevertheless, it is perhaps still not too late for the UK to trigger Article 127 EEA and formally withdraw from the Agreement. Article 124(1) of the DWA between the EU and the

UK provides that the UK shall be “bound by the obligations stemming from the international agreements concluded by the Union, or by Member States acting on its behalf, or by the Union and its Member States acting jointly” during the transition period. In essence, this would mean that the UK would retain its Contracting Party Status under the EEA Agreement until the end of the transition period on 31 December 2020. Therefore, if Article 124(1) of the DWA were to be included in the final withdrawal agreement, the UK would have time until 31 December 2019 to formally trigger the withdrawal procedure and fulfil the twelve months’ precondition of Article 127 EEA. Furthermore, if the final withdrawal agreement were to set out a later date of UK’s formal withdrawal from the EU or the European Council in an agreement with the UK were to decide to extend that period, the UK would still have time to formally trigger Article 127 EEA and ensure the simultaneous withdrawal from the EU and the EEA Agreement.

Despite the passing of 29 March 2018, the most legally straightforward option for the UK is to formally notify the other Contracting Parties of its intention to withdraw from the EEA Agreement in accordance with Article 127 EEA. The UK could simply input a precondition in its notification of withdrawal, stating that the withdrawal from the EEA Agreement takes effect on the date of which the Treaties of the EU cease to apply to it.

Lastly, one could speculate that a formal withdrawal of the UK from the EEA Agreement could come from the EU itself, or at least to the parts of the Agreement where the EU exercises its competences on the behalf of the UK.<sup>36</sup> The UK, as an EU Member State, exercises limited competences under the EEA Agreement, most of them falling under the competences of the EU. Therefore, it could fall on the shoulders of the European Commission to formally trigger Article 127 EEA on behalf of the EU since, according to Article 17(1) TEU “it shall ensure the Union’s external representation”. However, such action could result in a deeper uncertainty on UK’s EEA Contracting Party Status post-Brexit, since it could be interpreted as meaning that the UK would retain its Contracting Party Status in areas that the EU does not hold any competence. In order to erase the uncertainty that might arise after the UK formally withdraws from the EU, the best legal action would be for the UK government, or the UK in conjunction with the EU, to notify the EEA Contracting Parties of its intention to withdraw from the EEA Agreement.

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<sup>36</sup> Christophe Hillion: “The UK withdrawal from the EU: Legal implications for Norway as party to the EEA Agreement”, p. 9.

#### **4 UK withdrawal from the EEA Agreement – An option or obligation?**

The wording of Article 127 EEA seems to make it clear that the UK has the option to unilaterally withdraw from the Agreement if it so wishes, however, the UK government has not expressed its desire to do so and has in fact been of the opinion that a formal withdrawal from the EEA Agreement is unnecessary. While the consensus remains between the EU and the UK that the EEA Agreement will cease to apply to the UK post-Brexit, therefore rendering UK's formal withdrawal from the Agreement a more of a political matter rather than a legal matter, the question arises what is the point of Article 127 EEA? The UK is a Contracting Party to the Agreement and has expressed its desire to withdraw from it in conjunction with its withdrawal from the EU, is it as a consequence not under an obligation to formally trigger Article 127 EEA? And if not, to whom does the provision apply? Only the three EEA-EFTA States? Or is the provision more of a political declaration meant to emphasise voluntary cooperation among sovereign states?

An obligation to withdraw from the EEA Agreement cannot be deduced from Article 127 EEA itself, as it explicitly provides that a Contracting Party may withdraw from the Agreement. By comparison, Article 128 EEA obliges new EU states to apply for a membership to the Agreement while no such obligation applies to Switzerland or the other three EFTA Member States. In EU law, the most severe sanctions permitted against a Member State do not amount to expulsion from the EU. These sanctions can at most be suspension of certain rights deriving from the EU Treaties, “including the voting rights of the representative of the government of that Member State in the Council”.<sup>37</sup> Such sanctions can only be applied if there exists a serious and persistent breach by a Member State of the values referred to in Article 2 TEU, such as respect for human dignity, freedom, democracy, equality and the rule of law. Such sanctions would not terminate the membership of the state under sanction, even if there existed a very serious and persistent breach of those values. These sanctions form a part of EU's internal law and therefore, have no direct effect on the EEA Contracting Party's rights and obligations under the Agreement and thereby do not amount to an expulsion or an obligation to withdraw from the EEA Agreement. It has to be borne in mind that the UK has never been suspected of a breach of such fundamental values and its intention to withdraw from the EU is simply based on its legal right to do so under Article 50 TEU.

Consequently, one might reach the conclusion that an obligation of withdrawal from the EEA Agreement does not exist, however, the close relationship between membership of the EU

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<sup>37</sup> Article 7(3) TEU.

or EFTA and the EEA Agreement itself, might suggest that an obligation to withdraw from the Agreement can, under certain circumstances, arise.

Despite the fact that Article 127 EEA grants each Contracting Party the right to withdraw from the EEA Agreement, such a withdrawal could be considered necessary when a Contracting Party wishes to withdraw from the EU, unless that party were to accede to EFTA and join the other three EEA-EFTA States.<sup>38</sup> This can be deduced from several provisions of the Agreement and the institutional setup of the Agreement, which make it clear that the relationship between the EU and its Member States, on the one hand, and the EEA-EFTA States, on the other, is more far-reaching and of a special nature.<sup>39</sup> For example, the EFTA Court is the only court that the EU has allowed for in its association agreements, and the preamble of the Agreement reiterates “the high priority attached to the privileged relationship between the European Community, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity”.

Furthermore, if they UK were to withdraw from the EEA Agreement without formally triggering Article 127 EEA, it would create a legal precedence that the other Contracting Parties could, in theory, follow. For example, if Iceland were to come to the political conclusion that it should withdraw from the EEA Agreement, would it be required to trigger Article 127 EEA? If the UK is not under an obligation to do so, why should Iceland be? Both Iceland and the UK undertook the same obligations when they signed and ratified the EEA Agreement, therefore, their rights and obligations stemming from the Agreement should be interpreted in a similar and consistent manner.

Article 127 EEA provides for a special mechanism for withdrawal requiring that the other Contracting Parties to the Agreement should be formally notified when a Contracting Party decides to withdraw from the Agreement. With this in mind and the importance of legal certainty for all parties involved suggests that the withdrawal process should be triggered.<sup>40</sup> Without formally triggering the withdrawal process a dangerous precedence could be created which would render Article 127 EEA more of a political declaration rather than a legal provision which binds the Contracting Parties. Furthermore, the question on UK’s continuing Contracting Party Status will linger on. Some will continue to argue that the UK can retain its

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<sup>38</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 137.

<sup>39</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 138.A

<sup>40</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 140.

status as a Contracting Party, and therefore, the Agreement would continue to apply to the UK in its entirety. Others will argue that the Agreement will continue to apply to the UK at least in the areas to which the UK is a Contracting Party on its own right, and thereby, the Agreement will only cease to apply to the UK in those areas that the EU has the competences to act. The question might even have to be concluded before a judicial body, either the CJEU, the EFTA Court or UK's national courts. In order to erase all legal uncertainty around UK's participation in the EEA Agreement, the UK or perhaps the EU on behalf of the UK, should formally trigger Article 127 EEA.

## **5 The effects of the Brexit negotiations on the EEA Agreement**

### **5.1 Introduction**

Article 50(2) TEU provides that the EU shall negotiate and conclude an agreement with the withdrawing State, “setting out the arrangements for its withdrawal [and] taking account of the framework for its future relationship”. The EEA-EFTA States have a strong interest in such an agreement especially if it involves matters covered by EEA law, i.e. the internal market. Based on this procedure the European Council Guidelines provide for a two-phased approach to the negotiations with the UK.<sup>41</sup> The first phase aims at matters that “have been identified as strictly necessary to ensure an orderly withdrawal” (chapter 3.2).<sup>42</sup> Once the European Council determines that “sufficient progress” has been made the negotiations can proceed to phase-two (chapter 3.3). In accordance with Article 50(2) TEU the second phase of the negotiations involves “taking account of the framework for [the UK's] future relationship with the Union”.

These negotiations could potentially have a great impact on the internal market of the EU and hence the EEA Agreement. The UK is one of the largest trading partners of the EEA-EFTA States, especially for Iceland and Norway,<sup>43</sup> therefore the conclusions of the negotiations is of great interest for the EEA-EFTA States. The EEA Council has stressed the importance of safeguarding the EEA Agreement in light of the Brexit negotiations, in order to ensure “the continuation of a well-functioning, homogeneous EEA and preserving the integrity of the

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<sup>41</sup> See part II of the *European Council Guidelines following the United Kingdom's notification under Article 50 TEU*, 29 April 2017, EUCO XT 20004/17.

<sup>42</sup> Council Decision authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangement for its withdrawal from the European Union. Brussels 2017, COM/2017/0218 final.

<sup>43</sup> For example, Iceland exports to the UK amounted to 12% of the country's total exports in 2015, while Norway's exports to the UK amounted to 21% of the country's total exports in 2016.

Internal Market”.<sup>44</sup> Furthermore, the EEA Council has welcomed “the close dialogue and continuous exchange of information” between the EU and the EEA-EFTA States concerning the negotiations on UK’s withdrawal from the EU.<sup>45</sup>

The following chapters will take a look at the two phases of the negotiations as they currently stand in the beginning of May 2018.

## **5.2 The first-phase of the withdrawal negotiations**

According to the guidelines adopted by the European Council, the first-phase aims to “provide as much clarity and legal certainty as possible to citizens, businesses, stakeholder and international partners on the immediate effects of the United Kingdom’s withdrawal from the Union” and to “settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as a Member State.” To this end the European Commission published on 28 February 2018 a Draft Withdrawal Agreement (DWA) where it translates into legal terms the Joint Report concluded between the EU and the UK on the progress during phase-one of the negotiations.<sup>46</sup> Substantial proportion of the Agreement has already been agreed to at negotiators level, and therefore, will not undergo a major change, while other parts require extensive negotiations before being finalized.<sup>47</sup>

Even though the DWA does not explicitly mention the EEA Agreement, it does touch on important areas covered by the Agreement, such as: citizens’ rights, free movement of goods and dispute settlement concerning the interpretation and application of the Agreement. These areas form an integral part of the EEA Agreement and therefore are directly applicable to EEA law. Furthermore, the DWA provides that there shall be a transition or implementation period which applies from the date of entry into force of the Agreement until 31 December 2020.<sup>48</sup> According to Article 122(1) of the DWA the UK shall be bound by EU law during the implementation period, and in accordance with Article 124(1) of the agreement the UK shall be bound by all international agreements concluded by the Union and its Member States during the same period. This means that the UK will remain a Contracting Party to the EEA Agreement

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<sup>44</sup> European Economic Area Council of the EEA: Conclusions of the 48th meeting of the EEA Council. Brussels, 14 November 2017, EEE 1606/1/17 Rev 1.

<sup>45</sup> European Economic Area Council of the EEA: Conclusions of the 48th meeting of the EEA Council. Brussels, 14 November 2017, EEE 1606/1/17 Rev 1.para 3.

<sup>46</sup> See the DWA and Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union.

<sup>47</sup> See page 1 of the DWA

<sup>48</sup> See Article 121 of the DWA.

throughout the implementation period or until 31 December 2020. Both Article 122(1) and 124(1) have been agreed to at negotiators' level, thereby making it likely that they will end up in a final withdrawal agreement.

One of the most important areas of the DWA concerns citizens' rights. Despite the fact that the citizens of the three EEA-EFTA States do not enjoy the same rights as EU citizens under the rules of EU citizenship, the rights of establishment and the free movements of workers forms a part of EEA Agreement itself, while the citizenship directive has been, for the most part, incorporated into EEA law.<sup>49</sup> Therefore, if the final withdrawal agreement were to include, a large part of the EU citizens' rights *acquis* it could have a significant impact on EEA law. For example, if EU citizens living in the UK were able to continue to enjoy, some or most, of their EU-derived rights after the UK formally withdraws from the EU, the citizens of the EEA-EFTA States should also be able to continue to exercise similar rights. Such rights should be reciprocal and based on the principle of equal treatment to ensure homogeneity in the application of EEA law.<sup>50</sup>

Another area of the DWA that has direct relevance to the EEA Agreement is the free movement of goods. Article 37(1) of the DWA provides that any goods lawfully placed on the market of the EU or the UK before the end of the transition period, may circulate in those markets before they reach their end users or may be put into service in the EU or the UK. The free movement of goods forms an integral part of EU's internal market as extend to the EEA-EFTA Countries through the EEA Agreement. Thus, the right to free movement of goods, as enshrined in the DWA, should in a similar manner be extend to the EEA-EFTA States, to ensure that the rules governing the single market are applied in a non-discriminatory manner throughout the whole internal market.<sup>51</sup>

A third area of the DWA that can have a significant impact for the EEA Agreement is the dispute settlement system between the EU and the UK. It should be born in mind that this is one of the areas of the DWA that is most heavily contested. According to Article 126 of the DWA, the CJEU retains its ordinary jurisdiction during the implementation period. However, when that period ends CJEU's jurisdiction varies in accordance with the matter in question. For example, the CJEU shall continue to have jurisdiction in pending cases brought before the end

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<sup>49</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 144.

<sup>50</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 145.

<sup>51</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 146.

of the transition period and other relevant cases where the events took place before the end of the transition period.<sup>52</sup> Article 151 of the DWA provides that the CJEU shall have jurisdiction concerning cases on citizens' rights following a reference from a UK court or a tribunal if the case has commenced within eight years from the end of the transition period. Furthermore, Article 152 of the DWA provides that the UK shall setup an independent authority to ensure that EU citizens' rights are protected. Lastly the DWA envisages the establishment of a Joint Committee which shall be responsible for the implementation and application of the Agreement. The EU and the UK can bring disputes concerning the interpretation and application of the Agreement before the Joint Committee, which has the power to settle the dispute through recommendations. The Joint Committee can submit the dispute to the CJEU if both parties agree, or if the matter is not resolved within three months, the EU or the UK may submit it before the CJEU.

Even though the dispute settlement procedures, as described above, will go through some changes until they end up in the final withdrawal agreement, it is still evident that they will have to ensure that the EU-UK withdrawal agreement is applied uniformly throughout the whole single market. Along with the CJU, the Joint Committee will have to ensure that the surveillance and enforcement of the agreement takes into account relevant implications for EEA law to ensure homogeneous application of the agreement.<sup>53</sup> EEA-EFTA nationals living and working in the UK before Brexit should be able to rely on EEA-derived rights in a similar manner as a German national relying on his/her own equivalent EU rights.<sup>54</sup>

### **5.3 The second phase of the withdrawal negotiations**

Following the release of the DWA, the second-phase of the withdrawal negotiations was opened and the European Council adopted its guidelines for a post-Brexit relationship with the UK.<sup>55</sup> The second-phase concerns negotiations of an agreement setting out the future relationship with the UK. This could possibly include an agreement on UK's access to the internal market and even UK's possible accession to the EEA Agreement. Whatever the final agreement will entail it is clear that it touches directly on the interest of the EEA-EFTA States.

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<sup>52</sup> See Articles 82 to 87 of the DWA.

<sup>53</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 147.

<sup>54</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 147.

<sup>55</sup> European Council (Art. 50) guidelines on the framework for the future EU-UK relationship. 23 March 2018, EUCO XT 20001/18.

The economic relationship between the EU and the UK is the core of the future agreement and as such “the European Council confirms its readiness to initiate work towards a balanced, ambitious and wide-ranging free trade agreement”.<sup>56</sup> Such an agreement will, however, not be concluded while the UK is formally an EU Member States.<sup>57</sup> The UK is bound by the duty of sincere cooperation, and therefore, has to stay loyal to EU’s interest while it is still a EU Member State.<sup>58</sup> This also means that the UK cannot formally negotiate with the EEA-EFTA Countries on a future agreement concerning EEA law while the UK is still a EU Member State.<sup>59</sup> Furthermore, the EEA-EFTA Countries are also bound by a duty of cooperation as enshrined in Article 3 of the EEA Agreement which means that the EEA Contracting Parties “shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.” However, seen as the second-phase of the negotiations concerns the future relationship between the EU and the UK and will in all likelihood involve a free trade agreement with possible accession to the single market, the EEA-EFTA States should use this opportunity to clarify their interest on this future relationship.

In its guidelines on the future relationship between the EU and the UK, the EU Council expresses its readiness to negotiate a wide-ranging free trade agreement that would address, *inter alia*, trade in goods, trade in services and provisions on movement of natural persons.<sup>60</sup> Furthermore, the European Council stresses the point that “the four freedoms are indivisible” and that there will be no “cherry picking” allowed on UK’s participation in the Single Market “which would undermine the integrity and proper functioning of the Single Market.”<sup>61</sup> EU’s negotiation strategy concerning the single market makes it clear that if the UK wants a free trade agreement with the EU, involving the internal market, it will have to accept the four fundamental freedoms of the internal market. However, it still remains to be seen whether the UK can negotiate some stricter regulation on, for example, the free movement of persons or whether it will have to accept the internal market *acquis* for the four freedoms similarly to the EEA-EFTA Countries.

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<sup>56</sup> European Council (Art. 50) guidelines on the framework for the future EU-UK relationship. 23 March 2018, EUCO XT 20001/18, para 8.

<sup>57</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 147.

<sup>58</sup> The duty of sincere cooperation in Article 4(3) TEU. See also part V of the European Council Guidelines following the United Kingdom’s notification under Article 50 TEU. 29 April 2017, EUCO XT 20004/17.

<sup>59</sup> Christophe Hillion: „Brexit Means Br(EEA)it: The UK Withdrawal from the EU and its Implications for the EEA“, p. 147.

<sup>60</sup> European Council (Art. 50) guidelines on the framework for the future EU-UK relationship. 23 March 2018, EUCO XT 20001/18, para 7-10.

<sup>61</sup> European Council (Art. 50) guidelines on the framework for the future EU-UK relationship. 23 March 2018, EUCO XT 20001/18. 7.

Based on the guidelines the two parties could, theoretically, reach an agreement setting out UK's accession to the EEA Agreement once the implementation period ends on 31 December 2020.<sup>62</sup> This would require that the UK would have to apply to become a member of EFTA in accordance with Article 51 of the EFTA Convention, and as an EFTA State the UK can apply to become a party to the EEA Agreement in accordance with Article 128 EEA. This process would first require the approval of the three EEA-EFTA States along with Switzerland, in order for the UK to join EFTA, and second it would require the approval of all the EEA Contracting Parties. In essence, this would give each of the EU27 Member States, the EU, and the three EEA-EFTA States the power to veto UK's accession to the EEA Agreement.<sup>63</sup>

Whatever the framework of the future relationship between the EU and the UK will entail it is evident that it will have a great impact on the interests of the EEA-EFTA States. Any future free trade agreement concerning the internal market would certainly affect them directly and much more so if the EU and the UK were to agree on UK's possible accession to the EEA Agreement. Furthermore, if the EU and the UK were to fail to reach an agreement on their future relationship, essentially leaving the UK outside the single market, the EEA-EFTA States and the UK would still have to wait until the UK formally ceases to be a Member State of the EU to formally begin negotiations on a future trade deal.<sup>64</sup> The conclusions on a future relationship between the EU and the UK is therefore of a great concern for the EEA-EFTA States.

## **6 Conclusions on Part II**

Article 127 EEA provides for a rather straightforward withdrawal process that does not require any extensive negotiations concerning the arrangements of withdrawal but simply provides that the withdrawing State has to give at least a twelve months' notice in writing to the other Contracting Parties. However, in the case of a Contracting Party withdrawing from the EU, the withdrawal procedure cannot be examined without taking into account the withdrawal procedure of the EU found in Article 50 TEU. Due to the close relationship between the EU legal order and the EEA legal order a simultaneous withdrawal from the EU Treaties and the

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<sup>62</sup> According to Article 121 of the DWA the transition ends on 31 December 2020.

<sup>63</sup> However, if the final withdrawal agreement between the EU and the UK were to include provisions on UK's accession to the EEA Agreement, and such an agreement were to be ratified in accordance with EU primary law, the EU and its Member States would, in essence, lose their power to veto UK's accession to the EEA Agreement.

<sup>64</sup> As mentioned above this is due to the principle of sincere cooperation found in Article 4(3) TEU and Article 3 of the EEA Agreement.

EEA Agreement would serve to strengthen legal certainty. The fact that the deadline to ensure the simultaneous withdrawal of the EU Treaties and the EEA Agreement has formally passed and the current position of the UK is that it will not trigger Article 127 EEA, will only serve to extend the uncertainty surround UK's participation in the EEA Agreement post-Brexit. However, considering that the DWA provides that the UK shall be bound by the international agreements concluded by the Union during the implementation period, the UK has time until 31 December 2019 to fulfil the conditions of Article 127 EEA and formally notify the other Contracting Parties of its intention to withdraw from the Agreement.

The close and special relationship between the EEA legal order and the EU legal order and the fact that a membership of either one of those organisations seems to be a requirement for a Contracting Party Status to the Agreement suggests that the UK is under an obligation to formally withdraw from the Agreement. However, Article 127 EEA clearly provides that a Contracting Party may withdraw from the Agreement if it so wishes and nothing in the main text of the Agreement nor EU law suggest that a Contracting Party can be required do to so. Despite the fact that such an obligation does not arise following UK's withdrawal from the EU, the importance of legal certainty suggest that the UK should indeed formally notify the other Contracting Parties of its intention to withdraw from the Agreement in accordance with Article 127 EEA. UK's failure to do so will simply serve to extend the uncertainty around UK's possible continuing Contracting Party Status to the Agreement. Furthermore, it could create a legal precedence resulting in Article 127 EEA becoming a political statement rather than a legal procedure for a formal withdrawal from the EEA Agreement.

Finally, one cannot consider the impact of UK's withdrawal from the EU and its implications for the EEA Agreement without taking a look at the withdrawal negotiations between the EU and the UK. The first phase of the negotiations has already delivered the DWA, and even though it does not mention the EEA Agreement explicitly, it touches upon areas that could be very significant for the EEA Agreement. The DWA covers wide range of areas, including citizens' rights, an area that the EEA Agreement covers under the rights of establishment and the free movements of workers. A final withdrawal agreement concerning EU citizens' rights in the UK and UK citizens' rights in the EU post-Brexit, should also extend in a similar manner to citizens of the EEA-EFTA States in order to ensure the homogeneous application of EEA law throughout the single market. The same should apply to the free movement of goods which forms an integral part of the Agreement as one of the four freedoms of the internal market. Furthermore, the dispute settlement mechanism and surveillance control of the DWA could also have a big impact on the EEA Agreement and the rights of the EEA-

EFTA States. Such mechanism will need to ensure that implications for EEA law is taken into account in order to ensure homogenous application of EEA law.

The second phase of the negotiations covering the future relationship between the EU and the UK is of great relevance to EEA law and the EEA-EFTA States. The negotiations on a future relationship covers the future of trade between the UK and mainland Europe and possibly UK's access to the internal market. Theoretically such negotiations could end with an agreement setting out UK's accession to the EEA Agreement once the implementation period ends on 31 December 2020. However, that would apart from the EU and its Member States, also require the approval of the three EEA-EFTA States. An agreement on the future relationship between the EU and the UK will not be concluded while the UK is still a Member State of the EU, since the UK is bound by the duty of sincere cooperation while it remains a Member State, the same applies to any formal negotiations between the UK and the three EEA-EFTA States on a possible trade deal.

Whatever the framework of the future relationship between the EU and the UK will entail it is obvious that there is a lot at stake for the EEA-EFTA States. Any free trade agreement covering the internal market will affect them directly and in the case of the UK and the EU failing to reach an agreement, leaving the UK outside the internal market, would seriously hamper trade between the UK and the EEA-EFTA States especially in the light of the fact that they would have to wait until the UK has formally withdrawn from the EU to formally begin negotiations on a future trade deal. The uncertainty looming over, not only EU citizens, but also EEA citizens has to be addressed, ensuring that the latter enjoy their EEA-derived rights in the UK post-Brexit in a similar manner as EU citizens relying on their own equivalent EU rights.

## **Part III - The UK choose not to invoke Article 127 of the EEA Agreement**

### **1 Introduction**

The current position of the UK's government concerning its participation in the EEA Agreement after Brexit is that the UK cannot be a party to the Agreement without being a EU Member State, therefore there is no need to trigger Article 127 EEA.<sup>65</sup> The EU has held the same position as can be seen in the guidelines adopted by the European Council following UK's notification of withdrawal from the EU, where it states "following the withdrawal, the United Kingdom will no longer be covered by agreements concluded by the Union, or by Member States acting on its behalf or by the Union and its Member States acting jointly".<sup>66</sup> There seems to be a consensus among the leading figures of the Brexit negotiations that the EEA Agreement automatically ceases to apply to the UK after it formally leaves the EU. Despite this consensus some scholars argue that the matter is not that simple, at least in law.<sup>67</sup> They argue that the UK could retain its Contracting Party Status to the EEA Agreement in whole, or in part.

Part III examines the EEA Agreement in the light of UK's withdrawal from the EU and most importantly answer the main research question of this paper which is whether the UK can retain its Contracting Party Status to the EEA Agreement post-Brexit. This will be done by analysing the arguments put forward by legal scholars that have argued that the UK can continue to participate in the Agreement without being a member of the EU or EFTA. These scholars are: Ulrich G. Schroeter, Heinrich Nemecek and Gorge Yarrow.<sup>68</sup> Due to the rather limited number of scholars and publications that argue against the automatic cessation of UK's Contracting Party Status to the EEA Agreement, the author of this paper will attempt to add his own arguments to support this view. Furthermore, arguments that support the antithesis will be examined and the author of this paper will give his own assessment of these argument and try to answer the question whether the UK can continue to participate in the EEA Agreement post-Brexit. Finally, Part III also examines whether international law has any relevance in this discussion by taking a look at relevant judgments of the CJEU and the EFTA Court.

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<sup>65</sup> A spokesperson for the UK Government stated the following: "The UK is party to the EEA agreement only in its capacity as an EU member state. Once the UK leaves the EU, the EEA agreement will automatically cease to apply to the UK." Benjamin Kentish: "Article 127: What is the obscure section of EU law – and how could it stop Brexit?", <https://www.independent.co.uk/news/uk/politics/article-127-brexit-stop-what-is-it-single-market-eu-eea-theresa-may-article-50-a7955806.html>.

<sup>66</sup> European Council Guidelines following the United Kingdom's notification under Article 50 TEU. 29 April 2017, EUCO XT 20004/17, para. 13.

<sup>67</sup> See George Yarrow: "Brexit and the Single Market" and Ulrich G. Schroeter and Heinrich Nemecek; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area.

<sup>68</sup>Ulrich G. Schroeter and Heinrich Nemecek; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. George Yarrow: "Brexit and the Single Market".

Not only is the UK the first Member State of the EU to withdraw from the Union but also the first Contracting Party to the EEA Agreement to withdraw from the Agreement. Due to the legal precedence that UK's withdrawal from the Agreement might entail and the importance of legal certainty, not only for the States in question but more importantly for individuals and market operators of the internal market, it is important to examine all relevant arguments for and against UK's continuing participation in the EEA Agreement post-Brexit.

Part III is divided as follows: Chapter 2 will examine whether the silence of the EEA Agreement on the effects of a Contracting Party withdrawing from the EU can be interpreted as meaning that UK's withdrawal from the EU shall have no effects on its participation in the Agreement. Chapter 3 will examine Article 50 TEU and its effects on Article 127 EEA and mainly whether a notification of withdrawal under Article 50 TEU can be considered a notification of withdrawal from the EEA Agreement as well. Chapter 4 will examine the two-pillar structure of the EEA Agreement and whether it can be reconciled with a Contracting Party that does not belong to either pillar, that is the EU or EFTA. Chapter 5 will examine the relevance of international law in this debate, mainly whether the provisions of the VCLT concerning interpretation of treaties apply to the EEA Agreement, but also whether provisions of the VCLT provide any additional legal arguments for UK's automatic withdrawal from the EEA Agreement, post-Brexit. Finally, chapter six summarises the main arguments and conclusions of Part III.

## **2 The silence of the EEA Agreement on the effects of a Contracting Party leaving the EU**

The only provision of EEA law that allows a Contracting Party to be relieved of its obligations arising from the EEA Agreement is Article 127 EEA. This has prompted some scholars to argue that the uncertainty surrounding UK's continuing Contracting Party Status to the EEA Agreement, post-Brexit, is due to the fact that the EEA Agreement is silent on the effects of a Member State withdrawing from the EU.<sup>69</sup>

The question then arises why the Agreement is silent on this matter given that a membership to either the EU or EFTA seems to be a necessary precondition for a Contracting Party Status under the Agreement. Could it be that that it was the intention of the drafters of the Agreement

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<sup>69</sup> See Ulrich G. Schroeter and Heinrich Nemecek; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area, p. 928.

that a withdrawal from the EU or EFTA was to have no legal effects on the withdrawing State's Contracting Party status or was the matter simply overlooked? After Article 50 TEU was introduced into EU primary law and a withdrawal from the EU became a realistic possibility the effects of such a withdrawal on the EEA Agreement was not addressed in EEA law. The matter was not even addressed in 2014 when the EEA Agreement was amended to accommodate Croatia's accession to the EU.

Despite the silence of the main text of the Agreement nothing in the drafting history of the EEA Agreement suggests that it was the intention of the drafters that a withdrawal from the EU or EFTA was to have no legal effects on the withdrawing State's Contracting Party Status. The answer to this "uncertainty" simply lies in the history of the EU and its relationship with the EEA Agreement.

Before the introduction of Article 50 TEU into EU's primary law, the leading legal theory was that a unilateral withdrawal from the European Union was considered impossible.<sup>70</sup> The founding treaties of the European Union (with the exception of the Treaty establishing the European Coal and Steel Community) nor the succeeding treaties, contained any provision on Members State's right of unilateral withdrawal. Furthermore, the right of unilateral withdrawal was hard to reconcile with the wording of Article 312 EEC, which stated that "this Treaty is concluded for an unlimited period". It was not until the ratification of the Lisbon Treaty in 2009 that such a provision came to light. The reason why no provisions were introduced dealing with the possible withdrawal of a Member State are perhaps mainly four. First, a provision providing for the unilateral right to withdraw from the EU might undermine Members State's commitment to the European Communities and its objectives. Second, the mere fact that such a possibility existed might make it more likely that it came true.<sup>71</sup> Third, the introduction of such a provision would entail that some procedures would have to be drawn up to successfully execute such a complex and daunting task.<sup>72</sup> Fourth, and perhaps the most likely explanation is that the drafters simply hoped to discourage Members States from withdrawing.<sup>73</sup>

Whatever the reason may be, the silence of EU primary law on the legal right of Member States to unilaterally withdraw from the EU prompted two different schools of thoughts on the issue. Those who were of the opinion that the unilateral right to withdraw existed, even though the treaties were silent on the matter. They considered that since the Member States were

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<sup>70</sup> Nothing in EU law at that time allowed for a unilateral withdrawal from the EU.

<sup>71</sup> Hal S. Scott: „When the Euro Falls Apart“, p. 215.

<sup>72</sup> Hal S. Scott: “When the Euro Falls Apart”, p. 215.

<sup>73</sup> John A. Hill: “The European Economic Community: The Right of Member State Withdrawal”, p. 338.

sovereign states, they could exercise their sovereign right as “the Masters of the Treaties” to withdraw from the EU.<sup>74</sup> Others considered the Treaties silence on the matter as intentional, and therefore, it reflected the Member States commitment to the EU’s objectives and their acceptances that the European integration was irreversible. The latter view found strong support in the EC and EU Treaties, as they were both concluded for unlimited periods and the explicit goal in their preamble to strive for “an ever closer union among the peoples of Europe”.<sup>75</sup>

With the introduction of the Treaty Establishing a Constitution for Europe a provision on the possibility of unilateral withdrawal from the European Union was first introduced. Some have argued that Article 50 TEU was drafted in a hasty manner, without much discussion and that it was never designed to be used.<sup>76</sup> However, in the light of the fact that the text of the provision changed substantially from its first draft<sup>77</sup> to its final form in the Treaty Establishing a Constitution for Europe,<sup>78</sup> it is safe to say that it did draw at least some attention and consideration. The withdrawal clause found its way into the Lisbon Treaty without any major changes by the Lisbon Intergovernmental Conference and can now be found in Article 50 TEU.<sup>79</sup> Despite the fact that the possibility of unilateral withdrawal had become a part of EU primary law it did not, at first, gain much attention. This is perhaps due to the fact that it was considered more of a “hypothetical” provision rather than a provision that should be taken seriously. The man who drafted the provision, former Italian Prime Minister Giuliano Amato, even said that he had inserted the clause specifically to prevent the British from complaining that there was no clear cut, official way for them to bail out of the Union, and that his intention “was that it should be a classic safety valve that was there, but never used”.<sup>80</sup>

There are perhaps mainly two reasons for the EEA Agreement’s silence on the legal effects of a Contracting Party withdrawing from the EU. First is that the matter was simply overlooked. At the time of the drafting of the EEA Agreement EU primary law was silent on the issue of the right of a Member State to withdraw from the EU and the leading legal opinion at the time was that such a right did not exist. When the right of unilateral withdrawal was introduced, first in the Treaty establishing a Constitution for Europe and eventually with Article 50 TEU, it was

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<sup>74</sup> Phoebus Athanassiou: “Withdrawal and Expulsion from the EU and EMU – Some Reflections”, p. 11.

<sup>75</sup> See Article 2 of the Treaty of Rome, the preamble of the Maastricht Treaty and Article 1 TEU.

<sup>76</sup> Zoie O’Brien: “Article 50 was designed “Never to be used” – says the man who wrote the EU divorce clause”, <https://www.express.co.uk>.

<sup>77</sup> See Article 46 of the European Convention “Preliminary draft Constitutional Treaty”. Conv 369/02, 28 October 2002.

<sup>78</sup> See Article 59 of the European Convention: “Draft Treaty establishing a Constitution for Europe”. Conv 850/03, 18 July 2003.

<sup>79</sup> Piet Eeckhout and Eleni Frantziou: “Brexit and Article 50 TEU: A Constitutional Reading”, p. 6.

<sup>80</sup> Zoie O’Brien: “Article 50 was designed “Never to be used” – says the man who wrote the EU divorce clause”. <https://www.express.co.uk/>.

merely considered to be a hypothetical situation, a scenario that was theoretically possible but would not happen in the immediate future, and therefore there was no need to address the issue and its impact on EEA law. The second explanation is that the drafters of the EEA Agreement and the Contracting Parties considered a membership of either EFTA or the EU a necessary precondition for a Contracting Party Status under the Agreement, and therefore if a Contracting Party were to withdraw from either EFTA or the EU it would simply automatically lose its Contracting Party status as a consequence.

Whatever the reason might be it can be ascertained that it was not the will of the drafters of the Agreement that a Contracting Parties' withdrawal from the EU was to have no effect at all on the EEA Agreement. However, there are no explicit provisions in the Agreement setting out the effects of a Contracting Party that is no longer a Member State of the EU. In light of this the EEA Agreement has to be examined as a whole, taking into account the structure of the Agreement and the purpose and objectives it tries to achieve.

### **3 Article 50 TEU and its effect on Article 127 EEA**

Before examining the main text of the EEA Agreement and relevant EEA law a further look has to be taken at EU law and especially Article 50 TEU and examine whether a notice of withdrawal from the EU can be considered a notice of withdrawal from the EEA Agreement.

One view is that Article 50(2) TEU does not have direct effect on UK's Contracting Party Status under the EEA Agreement, and therefore the UK should be able to retain its Contracting Party Status post-Brexit.<sup>81</sup> The arguments centres around the fact that nothing in Article 50 TEU suggests that a withdrawal from the European Union has any direct consequences on the withdrawing state's membership to the EEA Agreement. Furthermore, the provisions concerning the notification of withdrawal from the EEA Agreement on the one hand, and the European Union on the other are quite different. While Article 50(2) TEU concerns the withdrawal from the EU, Article 127(1) EEA concerns the withdrawal from the EEA Agreement, and even though they are closely related they are in fact separate treaties.<sup>82</sup> Article 50 TEU does not explicitly mention any consequences on the withdrawing state's membership status to the EEA Agreement, nor for that matter on any other treaties (other than the EU Treaties). Article 50(3) simply states that "the Treaties shall cease to apply to the State in

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<sup>81</sup> Ulrich G. Schroeter and Heinrich Nemeček: "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. p. 929.

<sup>82</sup> Ulrich G. Schroeter and Heinrich Nemeček: "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. p. 930.

question”. Furthermore, the two withdrawal procedures have different addressees, while Article 50(2) TEU provides that a notification of withdrawal from the European Union has to be made to the European Council, Article 127(1) EEA provides that such a notification of withdrawal has to be made “to the other Contracting Parties”. Therefore, a notification of withdrawal from the EU in accordance with Article 50(2) would formally not reach the Contracting Parties of the EEA Agreement, not even on the EU side since it is the Commission that ensures the EU’s external representation.<sup>83</sup>

In addition, the two withdrawal clauses have very different time stamps, Article 127(1) EEA provides that a withdrawing state has to give at least a twelve months’ notice of its intention to withdraw from the Agreement, and therefore ceases to be a party to the Agreement after that period has ended. While Article 50(2) TEU provides for multiple time periods that depend on the agreements reached between the withdrawing State and the EU. Furthermore, Article 50(2) provides that the EU is under an obligation to negotiate with the withdrawing state “setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union”, while Article 127 EEA does not require any withdrawal negotiations.

While one can agree with the premise of the argument that a formal notification of withdrawal under Article 50 TEU cannot be considered also to be a notification of withdrawal under Article 127 EEA, it would be too elementary to ignore the overall consequences of Article 50 TEU, which is that the EU Treaties will cease to apply to the withdrawing State.

The EU has competences to negotiate and conclude agreements with third countries and international organisation and based on these powers the EU has concluded many external agreements, including the EEA Agreement.<sup>84</sup> UK’s decision to withdraw from the EU will have repercussions for those external agreements especially considering that in the view of the European Council the UK will no longer be covered by agreements concluded by the EU, or by its Member States acting on its behalf or by the two acting in conjunction, once it formally withdraws from the EU.<sup>85</sup> Moreover, many of those agreements contain a “territorial application” clause which restricts their application to the territories to which the TEU and TFEU are applied.<sup>86</sup> Therefore, even though Article 50 does not explicitly provide that the EEA

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<sup>83</sup> See Article 17(1) TEU.

<sup>84</sup> According to Article 47 TEU the EU has a legal personality and can, therefore, negotiate and conclude international agreements. See also Articles 218 TFEU on for EU’s procedure for negotiating and concluding international agreements.

<sup>85</sup> European Council Guidelines following the United Kingdom’s notification under Article 50 TEU. 29 April 2017, EUCO XT 20004/17, para 13.

<sup>86</sup> Vaughne Miller: “Legislating for Brexit: EU external agreements”, p 6.

Agreements ceases to apply to the withdrawing State at the time of withdrawal from the EU, such consequences might be deduced from the Agreement itself, to which we turn next.

## **4 The two-pillar structure of the EEA Agreement**

### **4.1 Introduction**

The main feature of the EEA Agreement and the element that surrounds the functioning of the Agreement is its two-pillar structure. Due to the fact that the EEA-EFTA States were not willing to formally transfer any powers to the EU or any EEA-EFTA bodies, a mechanism had to be created in order to ensure that the EEA-EFTA States would fulfil their obligations arising from the EEA Agreement. This was done with the establishment of the EFTA Court and ESA which essentially mirror the roles of their EU counterparts. These two organs were established by a separate Agreement, the SC Agreement, to which participation is limited to the three EEA-EFTA States. Furthermore, a number of joint bodies were created between the two-pillars with the participation of all the 31 EEA Countries.

The main arguments for UK's continuing Contracting Party Status to the EEA Agreement seem to neglect the *sui generis* nature of the EEA legal order and the institutional setup on which it relies. There is often the misconception among European lawyers that the EEA legal order simply falls under the auspices of public international law or forms a part of the EU legal order. The aim of this chapter is to demonstrate the special nature of the EEA legal order in international law, a legal order that falls somewhere in between the EU legal order and classic public international law.

This chapter will analyse the functioning and institutional setup of the two-pillar structure and examine whether the structure would hinder UK's continuing Contracting Party Status to the EEA Agreement post-Brexit. Chapter 4.2 will examine the structure itself and the institutional setup on which it is based. Chapter 4.3 will examine the definition of a "Contracting Party" in Article 2 EEA and whether the definition can be reconciled with UK's new position, post-Brexit. Chapter 4.4 will examine Article 126 EEA and whether the territorial application of the Agreement hinders UK's continuing Contracting Party status to the Agreement. Finally, Chapter 4.5 will examine Article 128 EEA concerning the conditions for accession to the EEA Agreement.

## 4.2 The two-pillar structure and the EFTA Organs

The creation of the two-pillar structure was an answer to a fairly complicated problem between the EEA-EFTA States and the EU. On the one hand the EEA-EFTA States wanted to participate in the internal market of the EU and have a say in the development of EEA law, however, on the other hand the EU did not want third states to have access to its organs in a similar manner as its Member States.<sup>87</sup> To overcome this problem organs had to be created on the EEA-EFTA side mirroring the roles of the respective EU organs to ensure that the EEA-EFTA States would fulfil their obligations arising from the Agreement. To this end Article 108(1) EEA provides that “the EFTA States shall establish an independent surveillance authority responsible for ensuring the fulfilment of the obligations under the Agreement”, while paragraph two provides that the EFTA States shall establish a court of justice. In accordance with this obligation the EFTA States established ESA and the EFTA Court with the introduction of the SC Agreement.

ESA is an international organisation with its own legal personality responsible for monitoring compliance, arising from the EEA Agreement and the SC Agreement, of the three EEA-EFTA States. According to Article 5(1) of the SC Agreement, ESA shall ensure the proper functioning of the EEA Agreement. It shall “ensure the fulfilment by the EFTA States of their obligations under the EEA Agreement” and the SC Agreement. It shall “ensure the application of the rules of the EEA Agreement on competition” and it shall “monitor the application of the EEA Agreement by the (...) Contracting Parties.”<sup>88</sup> It protects individuals and other market operators in the exercise of their single market rights on the EFTA-EEA pillar side. Furthermore, ESA has the power to act in other related areas, such as food safety, transport, environment and energy.<sup>89</sup> ESA holds substantial powers to ensure that the EEA-EFTA States fulfil their obligations arising from the Agreement. If ESA considers that an EEA-EFTA state has not fulfilled its obligation under the Agreement it can refer the matter to the EFTA Court in accordance with Article 31 of the SC Agreement. Individuals and undertakings can file a complaint with ESA regarding any national legislation, administrative practice or other practice of the three EEA-EFTA States that is in violation of a provision or principle of EEA law.<sup>90</sup> Furthermore, ESA has the power to make decision, formulate recommendations and deliver opinions on matters provided for in the EEA Agreement and the SC Agreement according to Article 5(2). ESA consists of three members each appointed by the governments of the EEA-

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<sup>87</sup> Georges Baurin in Carl Baudenbacher: *The Handbook of EEA Law*, p. 47.

<sup>88</sup> See Article 5(1) of the SC Agreement.

<sup>89</sup> Frank Büchel and Xavier Lewis in Carl Baudenbacher: *The Handbook of EEA Law*, p. 118.

<sup>90</sup> Frank Büchel and Xavier Lewis in Carl Baudenbacher: *The Handbook of EEA Law*, p. 119.

EFTA States. ESA mirrors, for the most part, the surveillance competences of the European Commission under EU law, but it does not have the same legislative powers and the political functions as the EU Commission does.<sup>91</sup>

Despite having concluded a number of trade agreements with some fifty states the EEA Agreement is the only external agreement concluded by the EU that allows for an independent judicial body.<sup>92</sup> The EFTA Court is a judicial organ that has “jurisdiction in actions concerning the settlement of disputes between two or more EFTA States regarding the interpretation or application of the EEA Agreement and the SC Agreement”.<sup>93</sup> According to Article 33 of the SC Agreement the EFTA States “shall take the necessary measures to comply with the judgments of the EFTA Court”, meaning that the judgments of the Court are in fact binding on the EEA-EFTA States. However, the SC Agreement does not contain any provision allowing for a penalty to be imposed on a non-complying state.<sup>94</sup> Like the ECJ has jurisdiction to give advisory opinions concerning EU law, the EFTA Court has jurisdiction to give advisory opinions regarding interpretation of the EEA Agreement arising from national courts or tribunals of the EEA-EFTA States.<sup>95</sup> It also has the jurisdiction in infringements actions brought by ESA against and EFTA States regarding the implementation, application or interpretation of EEA law.<sup>96</sup> Furthermore, the Court has jurisdiction in cases brought by an EEA-EFTA State, individual or a legal person against a decision of ESA that concerns them, and actions concerning a failure to act at the hand of ESA.<sup>97</sup> According to Article 28 of the SC Agreement the Court shall consists of three judges and even though each EEA-EFTA State has the right to nominate one judge, there is in fact no requirement of nationality.<sup>98</sup>

Furthermore, two other joint organs are responsible for the proper implementation and surveillance of the EEA Agreement. These are the joint organs of the EEA Council and the EEA Joint Committee.<sup>99</sup> According to Article 89(1) EEA the EEA Council is “responsible for giving the political impetus in the implementation of the Agreement and [lays] down the general guidelines for the EEA Joint Committee.” In essence the EEA Council is the political driving force of the EEA Agreement and makes decisions that lead to amendments of the Agreement.<sup>100</sup>

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<sup>91</sup> 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, p. 4.

<sup>92</sup> Carl Baudenbacher: *The Handbook of EEA Law*, p. 139.

<sup>93</sup> See Article 32 of the SC Agreement.

<sup>94</sup> Carl Baudenbacher: *The Handbook of EEA Law*, p. 151.

<sup>95</sup> See Article 34 of the SC Agreement.

<sup>96</sup> See Article 31 of the SC Agreement

<sup>97</sup> See Article 36 of the SC Agreement.

<sup>98</sup> Carl Baudenbacher: *The Handbook of EEA Law*, p. 142-143.

<sup>99</sup> See Article 89 and 91.

<sup>100</sup> See last paragraph of Article 89(1) EEA.

The Council consists of representatives from the Council of the European Union, the European Commission and one member of the Government of each of the EEA-EFTA States.<sup>101</sup>

The EEA Joint Committee's responsibility is to "ensure the effective implementation and operation of [the] EEA Agreement", and to that end "it shall carry out exchange of views and information and takes decisions in the cases provided for in [the] Agreement."<sup>102</sup> In essence the EEA Joint Committee is responsible for the incorporation of EU legislation into the EEA Agreement. The decisions of the EEA Joint Committee have to be taken by consensus of the parties. According to Article 93(1) the Committee consists of representative of the Contracting Parties. Before the Lisbon Treaty came into force these representatives comprised of ambassadors from the EFTA-EEA States and representatives from the European Commission, but in accordance with the Lisbon Treaty the representation in the Committee on the EU pillar-side was moved from the European Commission to the European External Action Service.<sup>103</sup>

The EFTA bodies are responsible for the homogeneous application of relevant EU law in the three EEA-EFTA States. Homogeneity is a fundamental principle of EEA law as it ensures the application of common rules throughout the internal market based on equal conditions of competition.<sup>104</sup> It has to be borne in mind that the doctrines of direct effect and supremacy of EU law do not form a part of the EEA Agreement and the EEA legal order, and therefore special arrangements had to be made in order to ensure the effectiveness of EEA law in the EEA-EFTA States. To this effect, Article 7 EEA provides that the EEA-EFTA States shall incorporate relevant EU regulations into their internal legal order, while acts corresponding to EU directives are left to the authorities to choose the proper method of implementation. This means that EEA law becomes a part of the internal legal order of the EEA-EFTA States in the same manner as domestic law. In academic writing this has been referred to as "quasi direct effect", meaning that individuals and market operators can rely on any rights deriving from EEA law at national level if it has been incorporated into the respective national legal order and given that they are unconditional and sufficiently precise.<sup>105</sup>

Concerning the "quasi-primacy" of EEA law, Protocol 35 to the EEA Agreement provides that the EFTA States shall introduce a statutory provision providing for the supremacy of implemented EEA rules in case of a possible conflict with other statutory provisions.

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<sup>101</sup> See Article 90(1). The provision speaks of the organs of the then European Communities which have since then been replaced by the organs of the now European Union in accordance with the Treaty of Lisbon.

<sup>102</sup> See Article 92(1) EEA.

<sup>103</sup> EEA Joint Committee on the EFTA website at: <http://www.efta.int/eea/eea-institutions/eea-joint-committee>.

<sup>104</sup> See Article 1 EEA.

<sup>105</sup> M. Elvira Mendez-Pinedo: *EC and EEA Law – A Comparative Study of the Effectiveness of European Law*, p. 153.

Furthermore, the Protocol emphasizes the fact that the EEA Agreement does not entail any transfer of legislative powers to the EFTA institutions. EEA law does, therefore, not have primacy over conflicting domestic law unless it has been incorporated into the EEA-EFTA States domestic legal order.<sup>106</sup>

The roles of the EFTA organs in the homogeneous application of EEA law cannot be overstressed. For example, the Joint Committee has the role of reviewing the development of the case law of the CJEU and the EFTA Court in order to preserve the homogeneous interpretation of the EEA Agreement.<sup>107</sup> It has the obligation to react in the event of a conflicting case law by seeking a political settlement and in failing so it may bring the matter before the CJEU.<sup>108</sup> According Article 6 EEA the EFTA Court shall follow the case law of the CJEU preceding the signing of the EEA Agreement on the interpretation of EEA law that is identical in substance to corresponding EU law. Furthermore, Article 3(2) of the SC Agreement provides that ESA and the EFTA Court shall take “due account” of the principles laid down by the CJEU given after the date of signature of the EEA Agreement. While the EFTA Court is required to follow older case law of the CJEU, it only has to take “due account” of the case law developed after the signing of the EEA Agreement. The EFTA Court has, however, never made any distinction between the case law of the CJEU depending on the signature of the EEA Agreement.<sup>109</sup> The EFTA Court has fulfilled its legal obligation and consistently followed the case law of the CJEU and it has even gone further than can be deduced from statutory provisions of EEA law.<sup>110</sup> In the landmark judgment of *Sveinbjörnsdóttir*, the EFTA Court stated that “the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own.”<sup>111</sup> The Court went on further to state that “the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement” that the principle of State liability must form an inherent part of the EEA legal order.<sup>112</sup> The EFTA Court decided to incorporate a fundamental principle of EU law, as developed by the CJEU, into EEA law and

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<sup>106</sup> This has been referred to by some scholar as „quasi-primacy“ of EEA law. See M. Elvira Mendez-Pinedo: *EC and EEA Law – A Comparative Study of the Effectiveness of European Law*, p. 145.

<sup>107</sup> See Article 105 EEA.

<sup>108</sup> Articles 105 and 111 EEA. Thornbjörn Björnsson: “Inside and Outside The EFTA Court: Evaluating the Effectiveness of the EFTA Court Through its Structures”, p. 87.

<sup>109</sup> Frank Büchel and Xavier Lewis in Carl Baudenbacher: *The EFTA Court Ten Years On*, p. 124.

<sup>110</sup> Frank Büchel and Xavier Lewis in Carl Baudenbacher: *The EFTA Court Ten Years On*, p. 125.

<sup>111</sup> Case E-09/97 *Erla María Sveinbjörnsdóttir v Iceland*, 1998 EFTA Court Report 95, para 59.

<sup>112</sup> Case E-09/97 *Erla María Sveinbjörnsdóttir v Iceland*, 1998 EFTA Court Report 95, para 60.

thereby going further than can be deduced from statutory obligations of the EEA Agreement in order to ensure homogeneity of EEA law throughout the internal market.<sup>113</sup>

The EFTA Court has gone to great lengths in order to ensure that individuals and market operators in the EEA-EFTA States enjoy similar rights under EEA law as individuals and market operators in the EU Member States enjoy under EU law. The approach of the two courts in their application of the principle of homogeneity in EEA/EU law is perhaps the best example of the CJEU engaging in a “horizontal dialogue” with another court.<sup>114</sup>

Any reasonable discussion on UK’s possible continuing Contracting Party Status to the EEA Agreement would have to take due account of the institutional setup of the Agreement and the important role that the EFTA Court has played in ensuring the homogeneous and effective application of EEA law. Therefore, if the UK were to continue to participate in the EEA Agreement, the logical solution would be for the UK to participate in the EEA-EFTA organs. In that case the UK could retain its access to the EEA Council and the EEA Joint Committee. Instead of being represented in the EEA Council by the Council of the European Union and in the EEA Joint Committee by the European External Action Service, they would simply be represented by a member of their own government in the EEA Council and an ambassador of their choosing in the EEA Joint Committee. However, ESA and the EFTA Court were established by another agreement, the SC Agreement, to which the UK would have to accede to in order to participate in these two important organs. Such possible accession is the topic of the next subchapter.

#### **4.2.1 The Surveillance and Court Agreement**

In order for the UK to continue to participate in the EEA Agreement after it formally withdraws from the EU it will have to participate in the organs responsible for surveillance and judicial control of the EEA Agreement. The logical step in that direction would be for the UK to accede to the SC Agreement and participate in ESA and the EFTA Court. The SC Agreement was created in accordance with Article 108(1) EEA in order to establish ESA and the EFTA Court. The SC Agreement is, therefore, at the core of the two-pillar structure of the EEA Agreement.

Article 50(1) of the SC Agreement provides that an EFTA State that decides to withdraws from the EEA Agreement shall as a result cease to be a party to the Agreement, while Article

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<sup>113</sup> Frank Büchel and Xavier Lewis in Carl Baudenbacher: *The EFTA Court Ten Years On*, p. 125.

<sup>114</sup> Allan Rosas: „The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue“, p. 13. And Philipp Speitler: *The Fundamental Principles of EEA Law*, p. 25.

50(2) provides that any EFTA State that accedes to the EU shall as a result cease to be a party to the Agreement on the same day as the accession takes effect. But most importantly, Article 51 provides that any EFTA State that accedes to the EEA Agreement shall accede to the SC Agreement on the terms and conditions laid down by the EFTA States.

As these provisions suggest the SC Agreement is limited to EFTA States only since its obvious function is to establish and oversee the two important organs on the EEA-EFTA pillar side of the EEA Agreement. The SC Agreement does not touch on the issue of a possible accession to the Agreement from a State that is not a Member of EFTA, however, the wording of Article 50 and 51 of the Agreement clearly exclude such a possibility. Therefore, if it were the will of the UK to accede to the SC Agreement it would first have to become a EFTA Member State and then accede to the EEA Agreement at which point it would be under an obligation to accede to the SC Agreement.

The counter-argument could perhaps be made that the SC Agreement is in fact a separate treaty that should not affect the Contracting Party Status of the UK under the EEA Agreement, even though the two Agreements are closely related. The SC Agreement only touches upon EEA-EFTA States role in the two organs responsible for overseeing their execution of the EEA Agreement. The UK is already a Contracting Party to the EEA Agreement and cannot be deprived of its status as such by other treaties, no matter how related they are to the execution of the EEA Agreement. Furthermore, in accordance with Article 40 of the SC Agreement, the three EEA-EFTA States could have the Agreement amended as to allow the UK to accede to it, and therefore participate in the two organs. Other option for the UK could even be to oversee the role of ESA and the EFTA Court themselves, meaning that UK's domestic institutions would be responsible for overseeing these roles on the part of the UK. Therefore, an access to these two organs or the corresponding institutions of the EU are not necessary to ensure the proper implementation and execution of the EEA Agreement.

Such arguments are however, not very convincing. Even though one agrees that the SC Agreement is, in itself, not a decisive factor on UK's continuing Contracting Party Status to the EEA Agreement, it simply reinforces the view that such a status is limited to members of the EU or EFTA. The SC Agreement is at the core of the two-pillar structure as it represent the two most important organs on the EEA-EFTA pillar-side. A Contracting Party both outside the EU and the SC Agreement would not have any access to the organs responsible for overseeing the obligations arising from the Agreement, and therefore could severely damage the homogeneous application of EEA law. Furthermore, the argument that domestic institutions could exercise the roles of ESA and the EFTA Court does not find any support in EEA law and would be

contrary to the purpose and objective of the EEA Agreement. The two international organs were especially setup to ensure the homogeneous application of EEA law throughout the internal market and by allowing a Contracting Party to rely on its domestic institutions to ensure its own fulfilment of the obligations arising from the EEA law could severely jeopardize the functioning of the Agreement.

#### **4.3 The definition of a “Contracting Party” in Article 2 EEA**

The first recital of the preamble to the EEA Agreement lists out the Contracting Parties to the Agreement. The list is divided into two groups representing the two pillars of the Agreement, the EU and its Member States representing one pillar, and the EEA-EFTA Countries of Iceland, Liechtenstein and Norway representing the other. Article 2 EEA further defines the term “Contracting Parties” of the Agreement. Article 2(b) states that “the term “EFTA States” means Iceland, the Principality of Liechtenstein and the Kingdom of Norway”. While Article 2(c) defines the term concerning the EU and its Member States as follows:

The term “Contracting Parties” means, concerning the Community and the EC Member States, 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.

The reason for this rather complex definition of the term “Contracting Parties” relating to the EU and its Member States is that the Member States of the EU have decided to surrender some of their sovereign powers (competences) to the EU. The powers of the EU are governed by the principle of conferral of competences.<sup>115</sup> Article 5(2) TEU provides that “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States”.

In certain areas the EU has the competences to act alone without the involvement of the Member States, or the so-called “exclusive competence” of the EU.<sup>116</sup> In some areas it has to share its competence with the Member States,<sup>117</sup> or “shared competence”, while in others the

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<sup>115</sup> First sentence, Article 5(1) TEU.

<sup>116</sup> See Article 3 TEU.

<sup>117</sup> See Article 4 TEU.

Member States retain their right to act alone without the involvement of the EU. Therefore, this rather complex definition of a “Contracting Party” concerning the EU and its Member States, is to match the fact that the competences to act in a certain policy area are not always clear-cut. For example, the policy area might cover wide range of issues that may involve the exclusive competence of the EU along with shared competence of both the EU and its Member States. Some policy areas might even require all three categories of competences.

Finally, there can be a shift of competences between the EU and its Member States as the EU evolves and new EU Treaties are drafted or amended. Since the ratification of the EEA Agreement the EU has gone through three notable changes of its internal legal order. First when the Treaty of Amsterdam entered into force on 1 May 1999. The Treaty of Amsterdam did not interfere with the structure of the EU, but mainly amended the common and final provisions of the EU Treaty, restructured the Common Foreign and Security Policy and radically reformed Title VI of the EU Treaty covering police and judicial cooperation in criminal matters.<sup>118</sup> The treaty also conferred some new competences on the Union, most importantly relating to visas, asylum, immigration and other policy areas related to the free movement of persons, to employment and to customs cooperation.<sup>119</sup> Secondly, when the Treaty of Nice entered into force on 1 February 2003. The Treaty of Nice did not change the structure of the EU but was mainly limited to the adjustment in the composition and operation of the EU Parliament, the Council and the Commission following the accession of new Member States, mainly to the east, and the reform of the EU judiciary.<sup>120</sup> The treaty did not have any major effect on the balance of competences between the EU and its Member States. Thirdly, and most importantly, were the changes made with the introduction of the Treaty of Lisbon that entered into force on 1 December 2009. The treaty was born after the failure to ratify the Constitution for Europe,<sup>121</sup> but most of the amendments introduced by the Constitution made their way into the Treaty of Lisbon. The Treaty of Lisbon abolished the two-pillar structure on which the EU was based and replaced the European Community and the European Union with a new European Union. The new EU, with its own legal capacity and the power to exercise both the former Community and non-Community competences. The Treaty of Lisbon also had some major effects on the

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<sup>118</sup> Koen Lenaerts and Peit van Nuffel: *European Union Law*, p. 51.

<sup>119</sup> Koen Lenaerts and Peit van Nuffel: *European Union Law*, p. 52.

<sup>120</sup> Koen Lenaerts and Peit van Nuffel: *European Union Law*, p. 55.

<sup>121</sup> After a negative outcome in referendums in France 55% against) and the Netherlands (61.6% against) the European Constitution was eventually scrapped leading to the introduction of the Treaty of Lisbon

competences of the Union. It clarified the allocation of competences between the EU and its Member States and the extent to which the EU institutions can exercise their competences.<sup>122</sup>

Article 2(c) EEA, therefore, allows for the smooth continuation of the EEA Agreement, despite the changes made to the EU legal order and the reallocation of competences between the EU and its Member States, and without requiring significant amendments to the Agreement every time such changes occur. The provision simply guarantees that obligations arising from the EEA Agreement are fulfilled on the EU side by either the EU institutions or the Member States or the two in conjunction.

Some proponents of UK's continuing EEA Contracting Party status post-Brexit argue that due to the EEA Agreement's flexible approach concerning the flow of competences between the EU and its Member States, as enshrined in Article 2(c), the UK could retain its Contracting Party status.<sup>123</sup> Their argument lies in the fact that the EEA-EFTA Contracting Parties have agreed that it does not matter, for their part, which of the Contracting Parties on the EU side fulfils the obligations flowing from the Agreement, as long as one Contracting Party does.<sup>124</sup> Post-Brexit the powers conferred upon the EU through the EU Treaties would revert back the UK, a scenario that Article 2(c) governs and does not hinder. The UK would simply be a Contracting Party governing all areas of the Agreement on its own, therefore fulfilling its obligations flowing from the Agreement just like any other Contracting Party.

Even though Article 2(c) EEA allows for a flexible approach concerning the competences between the EU and its Member States it is hard to see how a Contracting Party can retain its status after formally leaving the Union due to the wording of the provision. Even if one were to agree that the provision allows for all competences to flow back to a Member State from the EU, it still does not provide that a Contracting Party can be outside the EU. Article 2(c) clearly states that a "Contracting Party" concerning the EU, is either the EU itself, a EU Member State or the two working together. There is nothing in Article 2(c) that provides that a Contracting Party can be a former EU Member State. If, theoretically however, the UK were to regain its competences from the EU while still remaining a EU Member State it could fall under the definition of a "Contracting Party" found in Article 2(c).<sup>125</sup> However, the provision is clear that

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<sup>122</sup> Koen Lenaerts and Peit van Nuffel: *European Union Law*, p. 69.

<sup>123</sup> Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area, p. 937.

<sup>124</sup> Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area, p. 937.

<sup>125</sup> This is simply a hypothetical situation that would in all likelihood never come true. Furthermore, that would still not allow the UK to retain its Contracting Party Status due to other factors such as the two-pillar structure, the territorial application of the Agreement and other factors analysed in this paper.

it only applies to Member State of the EU and not the individual States on their own right. By formally withdrawing from the EU, the UK will no longer fall under the definition of a “Contracting Party” according to Article 2 EEA unless the UK were to become an EFTA State and become a Contracting Party under Article 2(b).<sup>126</sup>

The counter-argument could be made that the UK’s Contracting Party status is not dependent on the definition given to it in Article 2 EEA, but on the fact that such a status has been granted to the UK in its preamble where it is listed as one of the Contracting Parties. This argument will be further analysed in the next subchapter.

#### **4.3.1 The preamble of the EEA Agreement lists the UK as a Contracting Party**

The preamble of the EEA Agreement contains a list of all the Contracting Parties, which currently includes the United Kingdom of Great Britain and Northern Ireland. The preamble will continue to list the UK as a Contracting Party post-Brexit or until amendments are made to remove the UK from the list.

In light of this, the question arises whether the fact that the preamble of the EEA Agreement lists the UK as a Contracting Party, and will continue to do so post-Brexit, (given that the UK does not trigger Article 127 or allows for a treaty amendment to that preamble) overrules the seemingly clear intent of the Agreement that it shall only apply to Member States of either EFTA or the EU?

In order to answer the question a further look must be taken into the meaning of preambles in general and their intent in international law. Black’s Law Dictionary defines preamble as “an introductory statement in a constitution, statute, or other document explaining the document’s basis and objective; esp., a statutory recital of the inconvenience for which the statute is designed to provide a remedy”.<sup>127</sup> The VCLT seems to give preambles in international law more weight than this definition might suggest. Article 31(1) of the VCLT provides that “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”. Furthermore, Article 31(2) provides that in addition to the text, a treaties preamble shall be included in that context. It seems that the VCLT puts preambles in the centre of an interpretation of a treaty, thus almost making them a part of the text and a requirement in a context interpretation.<sup>128</sup>

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<sup>126</sup> Christophe Hillion: “Brexit Means Br(EEA)xit: The UK Withdrawal from the EU and its Implications for the EEA”, p. 139.

<sup>127</sup> See the word “preamble” in Bryan A. Garner: Black’s Law Dictionary. p. 1294-1295.

<sup>128</sup> Max H. Hulme: “Preambles in Treaty Interpretation”, p. 1298.

Despite this status given to preambles in the VCLT, they are mostly treated as evidence to a treaty's purpose and objective. This can be seen in a "practically universal" application of preambles as an interpretation method when determining the purpose and objective of a treaty, arising from historical practices and traditions in treaty drafting and interpretation.<sup>129</sup> In international jurisprudence there are many examples of the usage of preambles of a treaty in order to clarify the meaning of a particular provision or to identify the object and purpose of a treaty.<sup>130</sup> It is safe to say that the preamble of a treaty serves as a testimony to the object and purpose of the treaty, however, it is not directly binding to the contracting parties of the treaty because it is simply a preambular wording that is not meant to have a binding effect, but serve as an explanation of the reasons and purposes of the treaty itself.<sup>131</sup>

Aside from listing the Contracting Parties of the treaty, the preamble of the EEA Agreement sets out its objects and purpose, such as "the construction of Europe based on peace, democracy and human rights" and "the objective of establishing a dynamic and homogeneous European Economic Area based, on common rules and equal conditions of competition".<sup>132</sup> These values, among others listed in the preamble, are to be considered when interpreting the provisions of the Agreement. Listing the contracting Parties in the preamble gives little meaning to the purpose and objectives of the Agreement and simply does not serve that purpose at all. It simply lists out the Contracting Parties in the opening pages of the Agreement to clarify who has the status as a "Contracting Party", a status that is granted elsewhere in the Agreement, mainly Article 2(b) and (c) EEA. Furthermore, a preambular list of the current contracting parties cannot override the clear text of the Agreement setting out the conditions for a Contracting Party status, mainly that they have to be members of either EFTA or the EU. The Contracting Parties, including the UK, have agreed to the conditions set out in the EEA Agreement, and therefore, are bound by these conditions irrespective of their listing as a "Contracting Party" in the preamble.

If the UK were in fact to lose its Contracting Party Status under the EEA Agreement once it formally withdraws from the EU, the Agreement would simply be modified by removing the United Kingdom of Great Britain and Northern Ireland from the preamble.

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<sup>129</sup> Max H. Hulme: "Preambles in Treaty Interpretation", p. 1298.

<sup>130</sup> ECHR, *Golder v. The United Kingdom*. App no 4451/70 1975, para 34. WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 12 October 1998. Report WT/DS58/AB/R, para 129. WTO Appellate Body, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, 23 September 2002. Report WT/DS207/AB/R, paras 196–197. ICJ, ICJ, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624.

<sup>131</sup> Chang Fa Lo: *Treaty Interpretation Under the Vienna Convention on the Law of Treaties*, p. 185.

<sup>132</sup> See the preamble of the EEA Agreement. p. 4-6.

#### **4.4 Article 126 EEA – Territorial application of the EEA Agreement**

One of the biggest hindrance to UK's continuing Contracting Party status to the EEA Agreement, post-Brexit, and one that is often recited, is the territorial application provision of the Agreement found in the first paragraph of Article 126 EEA:

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.

Most external agreements of the EU contain a territorial application clause which limits the application of those agreements to the territories to which the EU treaties are applied. Once the UK formally withdraws from the EU it will no longer fulfil these conditions and therefore these external agreements will cease to apply to the UK and its overseas territories.<sup>133</sup> Article 126(1) EEA is simply one of many territorial application provisions that can be found in EU's external agreements.

The reason behind such provisions is simply to clarify where and to what extent these external agreements apply to the territories of its Contracting Parties. As a reminder of Europe's colonial past several of EU's Member States include special territories and regions to which the EU treaties apply in full, in part or not at all.<sup>134</sup> Article 52(1) TEU provides that the EU treaties shall apply to the territories of the Member States of the EU, setting out the main rule that the EU Treaties are to apply to the whole territory of its Member States. However, Article 52(2) TEU provides that the territorial scope of the Treaties is further specified in Article 355 TFEU. These special territories and regions are either "contracted out" of the EU Treaties or are "contracted in" but with special conditions and/or limits. For example, in relation to Denmark, the Faroe Islands and Greenland are contracted out of the EU Treaties.<sup>135</sup> While the Spanish autonomous regions of Ceuta and Melilla are contracted in, but are excluded from the customs union and the common agricultural and fisheries policies.<sup>136</sup>

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<sup>133</sup> See European Council Guidelines following the United Kingdom's notification under Article 50 TEU. 29 April 2017, EUCO XT 20004/17, para 13.

<sup>134</sup> Dimitry Kochenov: "The Application of EU Law in the EU's Overseas Regions, Countries and Territories After the Entry Into Force of the Treaty of Lisbon", *p. 684*.

<sup>135</sup> For Faroe Islands see Article 355(5)(a). After a referendum held in 1982, Greenland decided to withdraw from the EU. It is now associated to the EU under the Overseas Association Decision. For more see the European Commission's website at: [https://ec.europa.eu/europeaid/countries/greenland\\_en](https://ec.europa.eu/europeaid/countries/greenland_en).

<sup>136</sup> Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties. OJ NO L 302, 15.11.1985, p. 23–465.

The EU has already been through the process of defining to what extent the EU Treaties should apply to these overseas regions and territories, and therefore the logical solution, when determining the territorial application of EU's external agreements, is to refer the matter to the EU Treaties. By doing so a heavy administrative burden is avoided since it erases the need to independently address the issue of territorial application in each of EU's external agreements.

However, the issue of the territorial application of the EEA Agreement to the EEA-EFTA Contracting Parties had to be addressed independently. Luckily out of the original seven EEA-EFTA Contracting Parties only Finland had to deal with the issue of special territories which lead to the creation of Article 126(2) which provides:

Notwithstanding paragraph 1, this Agreement shall not apply to the Åland Islands. The Government of Finland may, however, give notice, by a declaration deposited when ratifying this Agreement with the Depository, which shall transmit a certified copy thereof to the Contracting Parties, that the Agreement shall apply to those Islands under the same conditions as it applies to other parts of Finland subject to the following provisions:

(a) The provisions of this Agreement shall not preclude the application of the provisions in force at any given time on the Åland Islands on:

(i) restrictions on the right for natural persons who do not enjoy regional citizenship in Åland, and for legal persons, to acquire and hold real property on the Åland Islands without permission by the competent authorities of the Islands;

(ii) restrictions on the right of establishment and the right to provide services by natural persons who do not enjoy regional citizenship in Åland, or by any legal person, without permission by the competent authorities of the Åland Islands.

(b) The rights enjoyed by Ålanders in Finland shall not be affected by this Agreement.

(c) The authorities of the Åland Islands shall apply the same treatment to all natural and legal persons of the Contracting Parties.

The Åland Islands is an autonomous region of Finland located in the Baltic sea between Finland and Sweden with a population of around 29 thousand.<sup>137</sup> The region enjoys a significant level of autonomy which the EEA Agreement had to address. However, one year after the EEA Agreement entered into force Finland acceded to the EU, meaning that the issue of the territorial

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<sup>137</sup> See the official Åland website at: <http://www.aland.ax/en/facts-about-aland/statistics-and-facts/>

application of the Agreement in relation to the Åland Islands is now addressed in EU law. The EEA Agreement was simply an interim measure for Åland Islands future status in the EU.<sup>138</sup>

Some scholars have raised the argument that Article 126 EEA is not decisive on UK's continuing Contracting Party Status to the Agreement. They argue that the provision is simply a territorial clause that in itself does not grant a Contracting Party Status but simply meant to clarify the territorial application of the EEA Agreement in cases where it does not apply to the entire territory of a Contracting Party.<sup>139</sup> Professor *George Yarrow* argues that the assumption that the UK will no longer fulfil the territorial conditions of Article 126(1), post-Brexit is an "error of logic".<sup>140</sup> He argues that the assumption would be right if the provisions states that "*The Agreement shall only apply...*" and since it does not there is nothing that precludes the possibility that it applies to countries that no longer fulfil the territorial condition. On the counterargument that the word "only" can be deduced from the text of the provision, the Agreement as a whole and the intention of the drafters, *Yarrow* argues that the burden of proof lies on those who argue for it, and that burden is a heavy one due to the obvious consequences that it would forcefully remove the UK as a Contracting Party to the Agreement. He further goes on and unconvincingly argues that there is nothing in the Agreement that points to a clear-cut intention that a membership of the EU or EFTA is necessary in order to be a Contracting Party to the Agreement, and that in the period leading to the Agreement coming into force it was the EU's policy to strengthen trade between countries, not to create barriers between states.<sup>141</sup>

*Yarrow* then points to three oddities to which he argues are signifiers that Article 126 EEA was not intended to determine whether a Contracting Party could participate in the EEA Agreement. First, he asks, since the question of who can be a Contracting Party and who cannot is so important, why is it not located much earlier in the Agreement where most of the substantive content is located. Secondly, he asks why the words "under the conditions laid down by that Treaty" appear in Article 126(1), and what do they mean if they could be omitted. Thirdly and finally, he turns to Article 126(2) and asks why the territorial application issue relating to the Åland Islands is bundled together in the same provision as such an important matter as the territorial application of the EEA Agreement.<sup>142</sup>

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<sup>138</sup> *Åland in the European Union*, p. 16-17.

<sup>139</sup> See Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. p, 936. And George Yarrow: "Brexit and the Single Market".

<sup>140</sup> George Yarrow: "Brexit and the Single Market", (2016), p. 23.

<sup>141</sup> George Yarrow: "Brexit and the Single Market", (2016), p. 24-25.

<sup>142</sup> George Yarrow: "Brexit and the Single Market", (2016), p. 25-26.

*Yarrow's* argument, that because Article 126(1) does not include the word “only” there is nothing that precludes the possibility that the EEA Agreement continues to apply to the UK post-Brexit, is not a very convincing one. The provision clearly states that the agreement shall apply to the territories to which the TEEC is applied (now the EU Treaties). Nothing in the provision suggests that the Agreement can apply to territories which the TEEC was applied. To interpret the provision as meaning that it also applies to the territories to which the EU treaties once applied to goes further than can reasonably be deduced from the text of the provision. The fact is that Article 126(1) is in itself not meant to grant a Contracting Party Status to the Agreement, it is simply meant to clarify the application of the Agreement according to a Contracting Party Status that has been granted elsewhere, mainly in Article 2 EEA. The provision simply reinforces the clear intent of the Agreement that a Contracting Party Status is limited to Member States of the EU and the EEA-EFTA States.

As to the three “oddities” that *Yarrow* points out as signifiers that Article 126 EEA is not meant to be decisive on the question whether the UK can retain its Contracting Party Status to the EEA Agreement, they all have logical and simple explanations. First, on the reason why the important matter of a Contracting Party Status is not addressed earlier in the Agreement where most of the substantive content is located, the answer is simply that it is in fact dealt with in Article 2 EEA. Article 2(b) provides that the term “EFTA States” means Iceland, Liechtenstein and Norway, while Article 2(c) provides that the term “Contracting Party” means, “concerning the Community and the EC Member States, the Community and the EC Member States, or the Community, or the EC Member States.” A Contracting Party Status is limited to the three EEA-EFTA States and the EU and its (current) Member States. The fact that Article 126 is located so late in the Agreement does not in itself devalue its meaning. The provision simply reinforces the view that a membership, either of the EU or EFTA, is an essential characteristic for a Contracting Party status to the Agreement. Furthermore, this conclusion also finds support in a provision located later in the Agreement, Article 128 EEA, which provides that a European State acceding to the EU, shall apply to become a member to the Agreement and that a European State becoming a member of EFTA may apply to become a party to the Agreement. Nothing in the provision, or any other in fact, provide for the possibility that a State outside of the two organisations can apply to become a party to the EEA Agreement. Article 128 EEA will be further examined in the next chapter.

Secondly, on why the words “under the conditions laid down in that Treaty” appear in Article 126(1) and what do they mean and if they could be omitted, the clear answer is that this wording is simply meant to clarify the territorial application of the EEA Agreement in regards

to the EU Member States. The EU had already undergone the process of defining the territories to which the EU Treaties should apply and by referring the matter to the EU Treaties the need to address the issue independently in the EEA Agreement is avoided. If the wording were to be omitted from the provision it would simply mean that the territorial issue of the EU Member States that is dealt with in the EU Treaties and EU law would need to be addressed independently in the EEA Agreement.

Thirdly, on why the issue of the Åland Islands is bundled together in the same Article as the important issue of who can and cannot be a Contracting Party to the EEA Agreement, the answer simply lies in the fact that Article 126 EEA is not, and never was, intended to be the sole determinative factor on the question of who can participate in the EEA Agreement. As noted above that question is mainly dealt with in Article 2 EEA. The main objective of Article 126 EEA is to clarify the territorial application of the EEA Agreement for both pillars of the Agreement, and since Finland was the only EEA-EFTA State at the time that needed to address the issue of special territories the logical step was to bundle it together with the territorial application of the EU-pillar.

In addition, some legal scholars argue that by denying UK's Contracting Party status based on changes inside the EU legal order would violate Iceland's, Liechtenstein's and Norway's rights under the agreement according to Articles 27 and 34 of the VCLT, given the fact the UK is already a Contracting Party, according to the Preamble of the Agreement, and the Treaty establishing the European Economic Community did apply to UK's territory at the time of the Agreement coming into force.<sup>143</sup> Leaving aside the issue on the relevance of public international law in EU/EEA law, which will be further examined in Chapter 5, the relevance of Article 27 and 34 of the VCLT is highly doubtful.

Article 27 of the VCLT provides that a party to a treaty cannot invoke provisions of its internal law to justify its failure to perform the treaty. While Article 34 provides that a treaty does not create either obligations or rights for a third State without its consent. In essence, they argue that the forceful removal of the UK from the EEA Agreement would violate the three EEA-EFTA States rights granted to them by the Agreement.

Article 27 is based on the fundamental principle of *pacta sunt servanda*.<sup>144</sup> In essence the provision "denies that a State can invoke the provisions of its internal law to avoid responsibility for the observance of its treaty obligations and in particular to justify its failure to perform a

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<sup>143</sup> Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. p, 936.

<sup>144</sup> See Article 26 of the VCLT.

treaty”.<sup>145</sup> The meaning of “internal law” encompasses everything from statutory and ordinary legislation to constitutional legislation.<sup>146</sup> Article 34 of the VCLT is pretty clear-cut and simply provides that no treaty rights or obligations can be imposed on a third State without its consent. The premise of the argument is that if Iceland, Norway and Liechtenstein were to argue that the UK had violated its treaty obligation concerning the EEA Agreement after Brexit, the UK could not invoke Article 50 TEU as a justification for its failure to perform the Treaty. The assumption in itself is right, the UK could not invoke Article 50 TEU or any other provision of its internal law to justify its failure to perform the EEA Agreement post-Brexit, however, the premise of the argument is itself faulty. The UK would never have to invoke Article 50 TEU in order to do so, it could simply argue that the EEA Agreement itself provides that a Contracting Party has to be either a member of the EU or EFTA. Since Iceland, Norway and Liechtenstein have agreed to this premise, based on their signature and ratification of the Agreement, their treaty rights will not have been violated, and therefore, Article 27 of the VCLT does not apply. The same reasoning can be applied in regard to Article 34 of the VCLT. By invoking the provisions of the EEA Agreement, itself, the three EEA-EFTA countries cannot be considered to be a third States, but simply consenting States that have agreed to the premise that the EEA Agreement only applies to states that are either members of the EU or EFTA.

#### **4.5 Only Member States of the EU and EFTA can accede to the EEA Agreement**

Another example of the two-pillar structure, and one of the most obvious one, are the rules on State accession. Article 128 EEA limits possible accession the EEA Agreement to Member States of either the EU or EFTA. The provisions states:

1. 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.
2. The terms and conditions for such participation shall be the subject of an agreement between the Contracting Parties and the applicant State. That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures.

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<sup>145</sup> Mark E. Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 371.

<sup>146</sup> Mark E. Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 372.

The first paragraph provides that a new Member State of the Community (now the EU) is under an obligation to apply to become a party to the EEA Agreement, however, the same obligation does not apply to new EFTA Member States, which may apply if they so wish. The provision is a clear manifestation of the two-pillar structure since it limits accession to those states that have access to the organs responsible for surveillance and judicial control of the EEA Agreement. Furthermore, accession to the SC Agreement goes hand in hand with accession to the EEA Agreement since it limits accession to EFTA States that are in the process of acceding to the EEA Agreement.<sup>147</sup>

The limitation of Article 128(1) EEA to new EFTA or EU Member States has prompted some scholars to argue that the provision does not apply to the UK post-Brexit due to the fact that the UK is already a Contracting Party to the Agreement.<sup>148</sup> Therefore, the UK would not have to re-apply to become a party to the Agreement and go through the conditions laid down in Article 128 EEA. Due to the two-pillar structure of the Agreement a direct accession to the EEA Agreement is in all likelihood impossible, and therefore, such a re-application process would require that post-Brexit, the UK would first have to apply for an EFTA membership.<sup>149</sup> The accession process would require the anonymous approval by all the EFTA Member States, giving each of them a veto right. What's more, the UK would then have to apply to become a party to the EEA Agreement in accordance with Article 128 EEA and conclude an Agreement with the Contracting Parties which would, in accordance with Article 128(2) EEA, give the EU, the remaining 27 EU Member States and the three EEA-EFTA States a right to veto UK's application. Due to the politically difficult task that this re-accession process entails it is perhaps not surprising that advocates for UK's continuing access to the internal market argue that the UK does not have to go through this process in order to remain a EEA Contracting Party.<sup>150</sup>

The argument presumes that the UK would not automatically lose its Contracting Party Status to the Agreement post-Brexit and that the reason for the conditions set out in the provision is to allow the Contracting Parties to retain control over new states joining the Agreement at a later time.<sup>151</sup> Such a control is an important element in a comprehensive

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<sup>147</sup> Article 51 of the SC Agreement.

<sup>148</sup> Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area, p. 932. See also George Yarrow: "Brexit and the Single Market" (2016), p. 4-5.

<sup>149</sup> George Baur: "Who Can Join the European Economic Area", p. 60. And see the accession process of EFTA in Article 56 of the Convention Establishing the European Free Trade Association

<sup>150</sup> Even though the process described in Article 128 EEA is perhaps not legally complicated, the same thing cannot be said about the political implications if the UK were to re-apply for EEA Contracting Party status.

<sup>151</sup> Ulrich G. Schroeter and Heinrich Nemeček; "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area, p. 932.

Agreement like the EEA Agreement, since an additional Contracting Party would expand the obligations of the existing Contracting Parties under the Agreement. In the case of the UK however, this purpose would not be threatened after Brexit since UK's participation in the Agreement was approved by all the Contracting Parties when the EEA Agreement entered into force in 1994, and therefore, would not expand the current obligations of the Contracting Parties.

Leaving aside the assumption that the UK will retain its Contracting Party Status under the Agreement, the argument still has some major flaws. First, the argument revolves around the assumption that Article 128 EEA is first and foremost meant to allow the Contracting Parties to have a say in the possible expansion of their obligations arising from the Agreement. Such a right is very common in multilateral treaties, and for example, can be found in the last paragraph of Article 49 TEU where it states that an admission agreement between the European Union and the applicant state "shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements".<sup>152</sup> It is the fundamental principle of international law that States are not bound by a treaty without their consent. Article 128 EEA simply recognises this right of States to have a say in the possible expansion of their obligations under the EEA Agreement. However, the conditions set out in Article 128 EEA go much further than simply giving each of the Contracting Parties a say in the possible expansion of their obligations, by further precluding the possibility that such expansion applies to states that are not members of EFTA or the EU. If it was in fact the sole purpose of the provision to ensure that the Contracting Parties had control over the future expansion of their obligations under the Agreement, it could have easily been achieved without a reference to the EU or EFTA since paragraph two provides that an accession agreement shall be ratified or approved by all Contracting Parties.

Secondly, is the argument that since UK's accession has already been approved in 1994 it does not entail any expansion of the current obligations of the Contracting Parties. Even though UK's continuing Contracting Party Status to the EEA Agreement will not in itself expand the current obligations of the Contracting Parties, the fact of the matter still remains that in 1994 UK's accession was approved because of its EU Member State status. Furthermore, as an EU Member State the UK fulfils the conditions set out for accession to the Agreement and as such it conforms with the two-pillar structure of the Agreement as a part of the EU-pillar. The UK as a Contracting Party outside the EU constitutes a fundamental change of circumstances that

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<sup>152</sup> For example, Article 12(3) of the Agreement Establishing the World Trade Organization provides that a decision on accession has to be approved by two-thirds majority of the Members of the WTO.

the EEA Agreement does not seem to accommodate for. In addition, this change of circumstances fundamentally alters the obligations of the remaining Contracting Parties without them having any say on the issue.

Article 128 EEA does not award a Contracting Party Status, nor does it directly touch upon the issue whether the UK automatically loses that status post-Brexit. The conditions set out in Article 128 EEA simply further reflect the intentions of the drafters of the EEA Agreement that it was only meant to apply to Member States of the EU and EFTA as the two pillars of free trade in Europe. In addition, these conditions reflect the legal and practical problems that would arise if a Contracting Party to the Agreement were not a member of either organisation since it would not have access to the organs responsible for surveillance and judicial control of the Agreement, and therefore, could seriously jeopardize the homogeneous application of EEA law throughout the single market.

## **5 The EEA Agreement and public international law**

### **5.1 Introduction**

As the EEA Agreement is an international agreement concluded between states and an international organisation the question arises to what extent public international law, or more precisely, the provisions of the VCLT apply to EEA law

The VCLT is an international treaty between states that defines what is a treaty, how they are made, how they operate, how they are amended and terminated. The VCLT is often referred to as “the treaty on treaties”.<sup>153</sup> The Convention reflects to a large extent customary international law and its rules are heavily relied upon by States, even when the States concerned are not parties to the Convention.<sup>154</sup> Several provisions of the Convention could be relevant concerning the automatic cessation of UK’s Contracting Party Status to the EEA Agreement post-Brexit, mostly provision concerning the interpretation of international treaties and the possibility of withdrawal or even suspension of a treaty. Chapter 5.2 will examine the argument put forward by advocates of UK’s Continuing Contracting Party Status to the EEA Agreement, mainly that the interpretation method as enshrined in the VCLT should be applied by interpreting the two-pillar structure in conformity with the purpose and objective of the Agreement. Chapter 5.3 will examine the interpretation method favoured by the CJEU and the

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<sup>153</sup> See Richard D. Kearney and Robert E. Dalton: „The Treaty on Treaties“. American Society of International, p. 495–561.

<sup>154</sup> Max Planck Encyclopaedia of Public International Law: Vienna Convention on the Law of Treaties (1969).

EFTA Court, and whether the two Courts would indeed follow the interpretation method as enshrined in the VCLT and interpret the Agreement as to allow the UK to remain a Contracting Party without being a member of the EU or EFTA. Finally, Chapter 5.4 will briefly examine the doctrine of subsequent practice and its relevance in the interpretation of the EEA Agreement.

## **5.2 Article 31(1) of the VCLT facilitates UK's continuing EEA Contracting Party Status**

Advocates for UK's continuing Contracting Party Status to the EEA Agreement, post-Brexit, have argued that the solution to overcome the seemingly clear intent of the EEA Agreement that it shall only apply to Member States of the EU or EFTA is to interpret the provisions of the Agreement in light of its purpose and objective as enshrined in Article 31(1) of the VCLT.<sup>155</sup> Article 31(1) of the VCLT provides that:

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.

They argue that Article 31(1) of the VCLT is a codification of customary law which the CJEU has frequently used in the interpretation of EU's association agreements with third States, and in addition, that this teleological interpretation method seems to be the "key interpretation method" used by the EFTA Court.<sup>156</sup> By applying the teleological interpretation method as it is enshrined in Article 31(1) of the VCLT an analysis of the purpose and objective of the EEA Agreement has to take place, and then it has to be compared to the relevant provisions of the EEA Agreement, and examine whether the application of those provisions, in light of UK's situation post-Brexit, runs counter to the purpose and objective of the EEA Agreement.

In the fourth recital of its Preamble it states that the objective is to establish a "dynamic and homogeneous European Economic Area, based on common rules and equal conditions for competition and providing for the adequate means of enforcement including at the judicial level, and achieved on the basis of equality and reciprocity and of an overall balance of benefits, rights and obligations for the Contracting Parties". Furthermore, Article 1 EEA provides that "the aim of this Agreement of association is to promote a continuous and balanced strengthening of trade

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<sup>155</sup> See George Yarrow: "Brexit and the Single Market" and Ulrich G. Schroeter and Heinrich Nemecek: "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. p. 933.

<sup>156</sup> Ulrich G. Schroeter and Heinrich Nemecek: "The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area. p. 933. See also Thomas Nordby and Kristoffer Nerland in Carl Baudenbacher: *The Handbook of EEA Law*, p. 313 and M. Elvira Mendez-Pinedo: *EC and EEA Law*, p. 131.

and economic relation between the Contracting Parties with equal conditions of competition, and the respect for the same rules, with a view to creating a homogenous European Economic Area”.

Once the UK has formally withdrawn from the EU, the two-pillar structure simply has to be interpreted in conformity with the purpose and objective of the Agreement in order to facilitate the new reality of the UK not belonging to either of the two-pillars. Supporters of this interpretation argue that there are two fundamental reasons why the Agreement refers to “EC Member States” on the one hand, and/or “EFTA States” on the other. One is that the wording is simply an alternative to “Contracting Parties” and is meant to apply to all parties without discrimination.<sup>157</sup> Therefore, the wording does not support a two-pillar structure and should be interpreted as applying to all Contracting Parties regardless of their membership of the EU or EFTA, thereby covering UK’s situation after Brexit. The other is that the two-pillar structure mirrors the two separate phases of EEA law’s legislative procedure.<sup>158</sup> In the first phase EEA law is created by the EU institutions as EU law with EEA relevance, and in the second phase that law is incorporated into the EEA Agreement. Therefore, the two-pillar structure is simply an accurate and a convenient way of categorizing the EEA Contracting States when the Agreements was drafted. In order to reconcile this two pillar-structure with UK’s post-Brexit situation, a teleological interpretation method has to be applied so the structure reflects the new status of the Contracting Parties. One pillar would be the EU and its remaining Member States as the creators of EEA law and the other pillar would be the remaining EEA Contracting Parties (including the UK) that are only required to follow EEA legislation once it has been incorporated into the EEA Agreement. By interpreting the EEA Agreement in accordance with its purpose and objective, the two-pillar structure could theoretically be interpreted as to allow the UK to remain a Contracting Party to the EEA Agreement post-Brexit, as a member of the second pillar. Furthermore, this interpretation of the two-pillar structure would not only allow the UK to retain its Contracting Party Status, but it would also strengthen the objective and purpose of the Agreement, mainly to strengthen trade and economic relation between the Contracting Parties

In sum, by applying the teleological interpretation method as enshrined in Articles 31 of the VCLT and interpret the EEA Agreement in the light of its purpose and objective it can be argued

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<sup>157</sup> Ulrich G. Schroeter and Heinrich Nemeček; “The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area, p. 934.

<sup>158</sup> Ulrich G. Schroeter and Heinrich Nemeček; “The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area, p. 935.

that the automatic cessation of UK's Contracting Parties status after Brexit runs counter to these values as enshrined in the Agreement. After all, how can automatic cessation of UK's Contracting Party Status strengthen trade between the Contracting Parties?

The only problem with the arguments described above is that the CJEU and the EFTA Court do not follow the interpretation method enshrined in Article 31 of the VCLT. The two Courts have developed their own method for interpreting EU and EEA law, thereby rendering the argumentation that the main text of the EEA Agreement could simply be interpreted in a manner consistent with the objective and purpose of the Agreement, mainly to strengthen trade and economic relations between the Contracting Parties, obsolete. The preferred interpretation method of the two Courts is the topic of the next subchapter.

### **5.3 The preferred interpretation method of the CJEU and the EFTA Court**

In the famous *Van Gend en Loos* case, the CJEU proclaimed that the Community constituted “a new legal order of international law”,<sup>159</sup> meaning that the Court considers the EU legal order of a special nature which does not fall under the general principles of public international law. The Court has declared that because of the special nature of the EU legal order, the VCLT does not apply to the EU's founding treaties.<sup>160</sup> Despite this, the Court has noted that the provisions of the VCLT that amount to customary international form a part of the EU legal order and the CJEU generally follows the VCLT.<sup>161</sup> However, the Court does not adhere to the rules of interpretation as enshrined in Article 31 of the VCLT but has created its own method of interpretation, an interpretation that goes further than simply a purpose driven teleological interpretation, by giving weight to a dynamic interpretation based on the special nature of EU law as an autonomous legal order.<sup>162</sup>

In Opinion 1/91 concerning examination of the compatibility of the judicial supervision mechanism of the EEA Agreement, the CJEU noted that the EEA Agreement is a treaty falling under the scope of international law. The Court noted that “the EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties”, while “in contrast, the EEC Treaty, albeit concluded in the

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<sup>159</sup> See CJEU, Case 26/62 *Van Gend en Loos* [1963] ECR I.

<sup>160</sup> CJEU, Joined cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP SP SpA and Others v the Commission of the European Communities* [2007] ECR II-4331, para 58.

<sup>161</sup> CJEU, Case 386/08 *Brita v Hauptzollamt Hamburg Hafens* [2010] ECR I-1289, para 42. See Also Jed Odermatt: “The Use of International Treaty Law by the Court of Justice of the European Union”, p. 122. And J Crawford, *Brownlie's Principles of Public International Law*, p 368.

<sup>162</sup> Miguel Poyares Maduro: “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”, p. 1-21. See also Carl Baudenbacher: *Handbook of EEA Law*, p. 172-173.

form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law. As the CJEU has consistently held, the Community treaties establish a new legal order”.<sup>163</sup> The CJEU branded the EEA Agreement as a traditional international treaty subject to public international law while the Court considered the EU Treaties of a special nature establishing a “new legal order”. The CJEU concluded its opinion finding that the system of judicial supervision that the founding fathers of the EEA Agreement had originally envisaged was incompatible with Community law.

Despite the rather conservative outlook of the CJEU on the soon to be established EEA Agreement, the EFTA Court had another vision. In its first judgement *Restamark*, the Court focused on the objective of the Agreement to ensure homogeneous application of EEA law to ensure equal treatment of individuals and market operators throughout the EEA.<sup>164</sup> From the very first days of its existence the EFTA Court emphasized on bringing the EEA Agreement closer to EU law through the principle of homogeneity instead of focusing on the alleged differences between the two legal orders.<sup>165</sup> This was made crystal clear in the landmark judgment of *Sveinbjörnsdóttir*, where the Court concluded that state liability formed an inherent part of the EEA Agreement even though no provisions of EEA law provided for such liability.<sup>166</sup> The Court declared that “the EEA Agreement 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 EC Treaty, but the scope and objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.”<sup>167</sup> Therefore, the EFTA Court located the EEA legal order somewhere between the supranational legal order of the EU and classic international treaty law.

Just like its sister court, the EFTA Court does not follow Article 31 and 32 of the VCLT when interpreting EEA law but applies the same methods as the CJEU.<sup>168</sup> In the judgement of *Pedice AS* the EFTA Court noted that due to the objective of the EEA Agreement of creating a dynamic and homogeneous European Economic Area, a dynamic interpretation of EEA law may be necessary.<sup>169</sup> Furthermore, the Court has also emphasized that EEA law has to be

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<sup>163</sup> CJEU Opinion 1/91 [1991] ECR I-6079. Opinion regarding the Draft Agreement between the European Community and the European Free Trade Association relating to the creation of the European Economic Area, Decision of 14 December 1991 [1992] I CMLR 245, para 20 and 21.

<sup>164</sup> EFTA Court, Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, 1994-1995 EFTA Court Report 15.

<sup>165</sup> Carl Baudenbacher: “The EFTA Court Fifteen Years On”, para. 3.

<sup>166</sup> Case E-09/97 *Erla María Sveinbjörnsdóttir v Iceland*, 1998 EFTA Court Report 95.

<sup>167</sup> Case E-09/97 *Erla María Sveinbjörnsdóttir v Iceland*, 1998 EFTA Court Report 95, para 59.

<sup>168</sup> Carl Baudenbacher: *Handbook of EEA Law*, p. 173.

<sup>169</sup> Case E-4/04 *Pedice AS and Sosial- og helsedirektoratet (Directorate for Health and Social Affairs)*, 2005 EFTA Court Report, 2005, para 28.

interpreted as to ensure its effectiveness.<sup>170</sup> While the teleological interpretation method seems to be the dominating interpretation method favoured by the EFTA Court, it is not limited to the conservative method as enshrined in Article 31(1) of the VCLT.<sup>171</sup> In its interpretation the court focuses on the *sui generis* nature of EEA legal order and its goal of creating a dynamic and homogeneous internal market in order to strengthen trade and economic relation between the Contracting Parties.

The two-pillar structure is the heart of the EEA Agreement and ensures the homogeneous application of EEA law throughout the internal market. As enshrined in Article 1(1) EEA the principal aim of the Agreement is to create a homogeneous European Economic Area.<sup>172</sup> A teleological interpretation of the Agreement, therefore, has to take due account of homogeneity as a fundamental principle of EEA law. Advocates for UK's continuing Contracting Party Status, post-Brexit, seem to focus only on one side of the coin which is to strengthen trade and economic relations between the Contracting Parties, while neglecting the other side, which is to reach this goal by creating a dynamic and homogeneous internal market. By categorising the two-pillar structure as simply mirroring the two phases of EEA law's legislative procedure and that the Agreements reference to "EC Member States" and "EFTA States" is simply an alternative to "Contracting Parties", reflects an overall misconception of the EEA legal order. A Contracting Party to the Agreement that is not a member of either the EU or EFTA would fall outside the two pillars and as a consequence would not be subject to any surveillance or judicial control. Such a Contracting Party would severely endanger the homogeneous application of EEA law, and therefore the purpose and objective of the EEA Agreement, especially in the light of the fact that the EFTA Court and the CJEU have been the driving forces in ensuring homogeneity between the EEA legal order and the EU legal order.

#### **5.4 Subsequent practice**

Article 31(3)(b) of the VCLT provides as a general rule of interpretation that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account. Article 31(3)(b) derives from the fact that the parties are the masters of their treaty, and therefore they cannot only take the interpretation of

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<sup>170</sup> See Case E-8/07 *Celina Nguyen v. The Norwegian State*, 2008 EFTA Court Report, 224, para 24. Case E-4/11 *Arnulf Clauder*, 2011 EFTA Court Report, 216 and Carl Baudenbacher: *Handbook of EEA Law*, p. 173.

<sup>171</sup> See Thomas Nordby and Kristoffer Nerland in Carl Baudenbacher: *Handbook of EEA Law*, p. 313 and Elvira Mendez: *EC and EEA Law – A Comparative Study of the Effectiveness of European Law*, p. 131.

<sup>172</sup> P. Wenneras in Carl Baudenbacher: *The Handbook of EEA Law*, p. 216.

its provisions further than can reasonably be deduced from the text of a treaty, but can also bring about an amendment to the treaty by their practice.<sup>173</sup> This practice as a tool in treaty interpretation is well established in international law.<sup>174</sup> However, this practice has its limits as set out by the International Court of Justice in *Land, Island and Maritime Frontier Dispute*, where the court noted that this practice cannot give a new meaning to a text of a treaty that is specifically not mentioned there.<sup>175</sup> Furthermore, for a practice to become relevant under Article 31(b)(3) of the VCLT it must constitute as “a sequence of acts or pronouncements” meaning that it cannot simply be an isolated incident.<sup>176</sup>

As was noted above the CJEU does not rely on the VCLT when interpreting the EU Treaties, however, some practices of the Contracting Parties might suggest that they do take into account some subsequent practices in the application of the EEA Agreement.

There are mainly two previous practices that indicate that the Agreement tolerates changes that originate outside the framework of the EEA Agreement. First is the fact that the Agreement still contains the wording “the European Community” and not “the European Union”, even though the European Community was formally dissolved into the EU by the Treaty of Lisbon in 2009. Since the Treaty of Lisbon came into effect Article 1(3) TEU has provided that “the Union shall replace and succeed the European Community.” Since 2009 the EEA Agreement has been through three amendments, first in 2010 on an EEA Financial Mechanism, second in 2014 when Croatia became an EEA Contracting Party following its accession to the EU, and third in 2016 when the EEA Financial Mechanism was updated. Despite these opportunities to update the text of the Agreement and reflect the current situation of the EU, the Contracting Parties failed to do so.

Second is the fact that Austria, Finland and Sweden withdrew from EFTA and joined the European Communities in 1995 without formally withdrawing from the EEA Agreement, and then re-acceding to it as members of the European Communities. The Agreement did not reflect this change until in 2004 when the Agreement was amended due to the EU’s first enlargement to the east. Thereby, from 1995 until in 2004 the Agreement listed Austria, Finland and Sweden as EFTA States, but at the same time the term “EC Member States” was interpreted as meaning the current Member States of the European Community.<sup>177</sup> Therefore the meaning to be given

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<sup>173</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 596.

<sup>174</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 596..

<sup>175</sup> ICJ, *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992, p. 350, para 380.

<sup>176</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 598.

<sup>177</sup>Ulrich G. Schroeter and Heinrich Nemeček; “The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area”, p. 939.

to the term “EC Member State” in the EEA Agreement at that time was not deduced from the Agreement itself but from outside the framework of the Agreement.

Advocates for UK’s continuing Contracting Party Status to the EEA Agreement argue that these practices show that the EEA Agreement tolerates changes that originate outside the framework of the EEA Agreement and are as such relevant when determining UK’s Contracting Party Status to the EEA Agreement, post-Brexit.<sup>178</sup> However, aside from the fact that a subsequent practice as enshrined in Article 31(3)(b) of the VCLT cannot give a new meaning to a text of a treaty that is specifically not mentioned there, the CJEU does not rely on the VCLT when interpreting the EU Treaties. In the judgment of *France v. Commission*, the Court stated that subsequent practice does not apply to EU primary law by stating that “in any event, a mere practice cannot override the provision of the Treaty.”<sup>179</sup> Furthermore, the Court seems to be reluctant to apply subsequent practice when interpreting international agreements as well.<sup>180</sup> The CJEU focuses heavily on attaining the objectives set out in the EU Treaties and therefore any practice that could jeopardize that attainment is only to be taken into account in special circumstances.<sup>181</sup> As was noted above the EFTA Court follows the same method of interpretation as the CJEU, and therefore would in all likelihood follow the same interpretation concerning subsequent practice.

Furthermore, it cannot be overlooked that both of the practices have very minor effect on the application of the Agreement and seem to be more of a practical nature rather than being an interpretation tool that gives a new meaning to the text of the Agreement. In reality, no new meaning was given to the term “the European Community” after it was formally dissolved into the European Union. As Article 1(3) TEU states the EU shall replace and succeed the European Community, and therefore the same meaning is given to the “the European Community” as before, that is, it basically refers to the same entity just with a different name. The fact that amendments have not been made to the text of the Agreement to accommodate for this change does not mean that the Contracting Parties are open towards major changes in the interpretation of the text of the Agreement. Their previous practice simply shows that there was no need to update the text to “the European Union” because there never were any ambiguities as to the meaning of the term “European Community”. The same can be said about the fact that Austria,

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<sup>178</sup> Ulrich G. Schroeter and Heinrich Nemeček; “The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area”, p. 938.

<sup>179</sup> CJEU, Case C-327/91 *France v. Commission* [1994] ECR I-3641.

<sup>180</sup> Jed Odermatt: “The Use of International Treaty Law by the Court of Justice of the European Union”, p. 138-139.

<sup>181</sup> Jed Odermatt: “The Use of International Treaty Law by the Court of Justice of the European Union”, p. 138-139.

Finland and Sweden were listed as EFTA States from 1995 until 2004 when they were in fact EU Member States. This was simply done for practical reasons since a shift from one pillar to the other did not bring about any major changes to the interpretation of the text of the Agreement. These States had already concluded their accession negotiations with the EU, and thereby their representation in the EU bodies responsible for the supervisory and judicial control of the EEA Agreement was already established.<sup>182</sup> In the reverse case of the UK leaving the EU and acceding to EFTA, it is evident that lengthy negotiations would have to take place, *inter alia* to amend the SC Agreement and the EEA Agreement or at least Article 2(b) and relevant Annexes and protocols.<sup>183</sup>

In the light of the fact that the CJEU does not apply the rules of subsequent practice as enshrined in Article 31(3)(b) of the VCLT and that the EFTA Court would in all likelihood follow the lead of its sister court, the logical conclusion is that any subsequent practice of the Contracting Parties to the EEA Agreement should not be taken into account when assessing the Contracting Party Status of the UK, post-Brexit.

## **5.5 Termination or suspension of the EEA Agreement in the light of the VCLT**

### **5.5.1 Introduction**

As was noted above the deadline for UK's notification of withdrawal from the EEA Agreement in accordance with Article 127 EEA passed on 29 of March 2018.<sup>184</sup> However, since Article 124(1) of the DWA between the EU and the UK provides that the UK shall be "bound by the obligations stemming from the international agreements concluded by the Union" during the transition period, it is perhaps not too late for the UK to fulfil the requirement of a twelve months' notice of withdrawal to the other Contracting Parties. In the light of the fact that the UK Government and the EU are of the opinion that there is no requirement to trigger Article 127 EEA in order for the UK to withdraw from the Agreement, it seems very unlikely that a formal withdrawal from the Agreement will ever take place.

Despite this consensus the question still remains on what legal grounds the EEA Agreement ceases to apply to the UK. Due to the legal precedence that UK's withdrawal from the Agreement might create, and the importance of legal certainty, it is necessary to examine the

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<sup>182</sup> 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", p. 11.

<sup>183</sup> 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", p. 11.

<sup>184</sup> In light of Article 50(3) which provides that the EU Treaties cease to apply to the UK two years after a formal notification of withdrawal has been given to the European Council.

legal grounds on which UK's withdrawal from the Agreement may rely. Is the fact that the UK will no longer fulfil the conditions set out in the Agreement for a Contracting Party Status enough to conclude that it automatically ceases to be a party to the Agreement? Or could additional legal arguments be made?

International law provides for mainly three possibilities that the EEA Contracting Parties or the UK could rely on in order to argue that the EEA Agreement would no longer apply to the UK, post-Brexit. First, in the case of a material breach of a treaty in accordance with Article 60(2) of the VCLT. Second, in the case of an impossibility of performance of a treaty in accordance with Article 61 of the VCLT, and third, in the case of a fundamental change of circumstances according to Article 62 of the VCLT. Articles 60-62 of the VCLT reflect, for the most part, customary international law, which the CJEU has noted are binding upon the EU and form a part of the EU legal order, thereby applying to EEA law as well.<sup>185</sup> These three provisions of the VCLT will be examined in the next subchapters. It should be borne in mind that the scenarios described below are very unlikely given the complicated political nature of the Brexit negotiations and the consensus that exists between the parties that the EEA Agreement will automatically cease to apply to the UK post-Brexit.<sup>186</sup>

### **5.5.2 A material breach**

Article 60 of the VCLT codifies termination or suspension of the operation of international treaties as a consequence of their breach. Article 60(2) states:

A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State; or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a

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<sup>185</sup> See Case C-386/08 *Brita v Hauptzollamt Hamburg Hafen* [2010] ECR I-1289, para 42 and CJEU, Case C-162/96 *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1994] ECR I-3655, para. 44. See Also Jed Odermatt: "The Use of International Treaty Law by the Court of Justice of the European Union", p. 122.

<sup>186</sup> See 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", p. 12.

character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

The provision provides that in a case of a material breach by a party, all the other parties by a unanimous agreement, may suspend the operation of the treaty in whole or in part or terminate it altogether. This they can do either in relation between themselves and the defaulting State, which would ensure the continuing application of the treaty between the innocent States, or between all the parties, which would effectively terminate the treaty.<sup>187</sup>

In the light of the fact that Article 60 is an exception to the general rule of *pacta sunt servanda* it has to be interpreted in narrow terms. This is enshrined in the condition of a “material breach” as defined in sub-paras. 3(a) and (b). Sub-para. 3(a) provides that a material breach of a treaty consists in “a repudiation of the treaty not sanctioned by [the VCLT]”, while sub-para. 3(b) provides that it consists in “the violation of a provision essential to the accomplishment of the object and purpose of the treaty.” In the *Gabcikovo-Nagymaros* judgment, the ICJ provided that “only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.”<sup>188</sup>

In accordance with Article 42(2) of the VCLT party may only withdraw from a treaty in accordance with the provisions of the treaty or by the application of the provisions of the VCLT. UK’s failure to formally withdraw from the EEA Agreement could therefore be construed as to run counter to Article 42(2) and thereby falling under the conditions set out in Article 60(3)(a), allowing the remaining Contracting Parties to the EEA Agreement to suspend the Agreement in relations between themselves and the UK. Furthermore, one could argue that by not belonging to either of the two-pillars of the EEA Agreement the UK would be violating provisions that are “essential to the accomplishment of the object and purpose” of the Agreement as enshrined in Article 60(3)(b) of the VCLT.<sup>189</sup> In such a case the remaining Contracting Parties to the EEA Agreement could also suspend the operation of the Agreement in whole, or only in relation to the UK.

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<sup>187</sup> Mark. E Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 744.

<sup>188</sup> ICJ, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, I.C.J. Reports 1997, p. 7, para 106.

<sup>189</sup> For example, Articles 28(1), 31, 34, 36 and 40 EEA.

### 5.5.3 “Impossibility of performance” according to Article 61 of the VCLT

Article 61 of the VCLT provides that under certain circumstances a party may invoke an impossibility of performance as grounds for withdrawal. Paragraph one provides:

A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Article 61(1) is intentionally constructed in narrow terms as it is an exemption to the general rule of *pacta sunt servanda*, and therefore has to be interpreted narrowly. The provision requires that the impossibility of performance has to “result from the permanent disappearance or destruction of an object indispensable for the execution of the treaty.” The provision does not apply in circumstances where it has become impossible to meet the object and purpose of the treaty but only when it is due to the disappearance or destruction of an indispensable object.<sup>190</sup> There is little State practice to rely on in order to shine a light on the type of cases that could fall under the provision. However, the ILC gave the following example: “the submergence of an island, the drying up of a river or the destruction of a dam or hydro-electric installation”.<sup>191</sup> Later the ILC extended the meaning of a “object” beyond that of only a physical object, to add that it also envisages the disappearance of a “legal situation” indispensable for the execution of a treaty.<sup>192</sup> It gave the following example: “a treaty between two States concerning aid to be given to a trust territory will cease to exist if the aid procedures show that the aid was linked to a trusteeship regime applicable to that territory and that regime has ended”.<sup>193</sup>

In order to fall under Article 61 of the VCLT, loss of UK’s EU Membership has to amount to an absolute impossibility of performing the EEA Agreement, while the relative impossibility falls at most under Article 62 of the VCLT.<sup>194</sup> So the question is whether UK’s EU Member State status can be considered a “legal situation” that is indispensable for the execution of the EEA Agreement, so it amounts to an impossibility of performance in accordance with Article 61 of the VCLT.

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<sup>190</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1132.

<sup>191</sup> International Law Commission: “Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly”. Commentary to Art 58, para 2.

<sup>192</sup> International Law Commission: “Draft articles on the law of treaties between States and international organizations or between international organizations with commentaries”. Commentary to Art 61, para 3.

<sup>193</sup> International Law Commission: “Draft articles on the law of treaties between States and international organizations or between international organizations with commentaries”. Commentary to Art 61, para 3.

<sup>194</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1133.

An argument could be made that the two-pillars of the EEA Agreement amount to an indispensable object for the exercise of the Agreement, and thereby the post-Brexit situation of the UK being outside the organs responsible for surveillance and judicial control of the Agreement amounts to an impossibility of performance in accordance with Article 61 of the VCLT. This would allow the UK to unilaterally withdraw from the EEA Agreement.

The counterargument could be made that if it were the will of the other Contracting Parties that the UK were to retain its EEA Contracting Party Status post-Brexit, they could, along with the UK, make the necessary amendments in order to ensure UK's continuing execution of the Agreement. The UK could still, in theory, continue to execute, many of the responsibilities stemming from the Agreement. The fact that the UK would no longer take part in the institutional organs responsible for the proper functioning of the Agreement could be considered as hindrances that do not amount to an absolute impossibility of performance and that such hindrances can at most be considered to amount to a relative impossibility, and therefore would rather fall under Article 62 of the VCLT.

The question whether the UK could apply the rule of impossibility of performance in order to withdraw from the EEA Agreement would depend on whether the two-pillar structure, and more precisely the organs responsible for surveillance and judicial control of the Agreement, can be considered as objects indispensable for the execution of the EEA Agreement.

#### **5.5.4 Fundamental Change of Circumstances**

The doctrine of fundamental change of circumstances is premised on the notion that “every contract is to be understood as being based on the assumption of things remaining as they were at the time of its conclusion.”<sup>195</sup> Article 62 of the VCLT codifies this doctrine, the first paragraph states:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

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<sup>195</sup> Mark E. Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 766.

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

Similarly, to Article 61 of the VCLT the provision is meant to cover unforeseen circumstances or events that affect the execution of a treaty, after its conclusion which happen outside its framework.<sup>196</sup> Unlike Article 61 however, the provision covers changes in circumstances in wider terms than simply an impossibility of performance due to a permanent disappearance or destruction of an object. Like Article 61, the provision is an exception to the fundamental principle of *pacta sunt servanda*, and therefore has to be interpreted narrowly. The provision tries to balance this fundamental principle against the principle of equity and justice, where a fundamental change in circumstances can result in an unfair and unjust execution of a treaty, and therefore treaties can lose their object and purpose.<sup>197</sup>

Article 62(1) provides mainly four conditions that have to be met in order to invoke change of circumstances. First, the change of circumstances has to be substantial and of significant importance in order to meet the criteria of being “fundamental”; second, the fundamental change may not have been foreseen by the parties; third, the existences of these circumstances must have “constituted an essential basis of the consent of the parties to be bound by the treaty”; and fourth, the effect of the change must have radically transformed the extent of the remaining obligations. The VCLT does not shed a light on what changes constitute as “fundamental” but the issue has been dealt with by international courts.

In the *Fisheries Jurisdiction Case*, the ICJ examined whether a provision in an agreement between Iceland and the UK, concerning the jurisdiction of the Court, could be terminated due to a fundamental change of circumstances concerning fishing techniques and international law related to fisheries. In regard to the change in fishing techniques, the Court concluded that these changes were not sufficient enough to affect the provision regarding the court’s jurisdiction. In this regard the Court gave the following interpretation of what constitutes as “fundamental change”:

In order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have

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<sup>196</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1144.

<sup>197</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1144-1145.

increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.<sup>198</sup>

In regard to the change in international law concerning fisheries, the Court noted that “changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty”.<sup>199</sup> The Court concluded that even though the agreement concerned the recognition of a 12-mile fisheries zone, an issue that had since disappeared due to change in international law, it also had a wider scope including the jurisdiction of the court over disputes.<sup>200</sup> In the ICJ judgement of *Gabcikovo-Nagymaros*,<sup>201</sup> Hungary argued that a Treaty between Hungary and Slovakia on a joint investment had suffered a fundamental change in circumstances due to the fact that the notion of “socialist integration” for which the Treaty had originally been a “vehicle” but had since disappeared when the two States emerged as market economies. The Court concluded that the “political conditions were (...) not so closely linked to the object and purpose of the treaty that they constituted an essential basis of the consent of the parties, and in changing radically altered the extent of the obligations still to be performed.”<sup>202</sup>

These two judgements show that the term “fundamental change” is indeed interpreted very narrowly. Not only is it necessary that the change has to be substantial and of significant importance, but it also has to be closely linked to the purpose and objective of the treaty and radically alter the extent of the obligations to be executed. As can be seen in the *Fisheries Jurisdiction Case*, the Court does not preclude the possibility that changes in law can amount to a fundamental change and give rise to the application of Article 62 of the VCLT. Such legal changes could, for example, be a new rule of customary international law that emerges after a treaty has been signed which binds all the parties and is considered to be a *lex posterior*, and therefore prevails over the treaty.<sup>203</sup> However, a party cannot invoke a change of domestic law as a fundamental change of circumstances. This derives from Article 27 of the VCLT which states that “a party may not invoke the provisions of its internal law as justification for its failure

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<sup>198</sup> ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgement, I.C.J. Reports 1974, p. 3, para. 43

<sup>199</sup> ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgement, I.C.J. Reports 1974, p. 3, para 32

<sup>200</sup> ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgement, I.C.J. Reports 1974, p. 3, para 32

<sup>201</sup> ICJ, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, I.C.J. Reports 1997, p. 7.

<sup>202</sup> ICJ, *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, I.C.J. Reports 1997, p. 7, para. 104.

<sup>203</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1158-1157.

to perform a treaty”. “Internal law” in this sense has to be widely interpreted, meaning everything from constitutional- and primary law to secondary- and local law. There is little doubt that the EU Treaties form a part of UK’s internal law, and by invoking Article 50 TEU the UK was in fact exercising a right that forms a part of its internal law.<sup>204</sup>

The second condition is that the change in circumstances may not have been foreseen by the parties of the treaty. This means that the changed circumstances did not exist at the time the treaty was concluded, and thereby were not foreseen by the parties. In regard to the UK, it can reasonably be argued that none of the EEA Contracting Parties at that time could have reasonably foreseen an EU Member State withdrawing from the EU at the time of the Agreement’s conclusion. This can be deduced from the fact that at the time of the EEA Agreement’s ratification there was no provision of EU law that allowed for the unilateral withdrawal from the EU, and the leading legal opinion at the time was that such a withdrawal was not possible.<sup>205</sup> Such a possibility did not exist until the Treaty of Lisbon came into effect in 2009 introducing Article 50 TEU.

The third condition is that the existence of the circumstances that changed have to have “constituted an essential basis of the consent of the parties”. The circumstances that later changed must have been “the determining factor for all the parties to enter the treaty”,<sup>206</sup> meaning that in the absence of these circumstances the parties to the treaty would not have entered into the treaty or drafted it differently. In regard to the EEA Agreement it is safe to conclude that a membership of the EU or EFTA constituted as a determining factor for the parties to enter the Agreement. The EEA Agreement was drafted to enhance trade between EFTA Member States and the Member States of the EU and the structure of the Agreement mirrors this fact. Furthermore, in the case of the UK withdrawing from the EU it will no longer participate in the organs responsible for the proper implementation and surveillance of the Agreement since it is the responsibility of EU organs to fulfil this obligation concerning the EU-pillar.

The fourth and final condition is that the effect of the change must have radically transformed the extent of the remaining obligations. In the *Fisheries Jurisdiction Case* the ICJ noted that the change of circumstances “must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that

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<sup>204</sup> EU law is incorporated into UK internal legislation with the European Communities Act of 1972. This act has since been amended on numerous occasions, most recently with the European Union Act of 2008 which gave the Lisbon Treaty an effect in UK law. Therefore, Article 50 TEU forms a part of UK’s internal law.

<sup>205</sup> Phedon Nicolaidis: “Withdrawal From the European Union: A Typology of Effects”, p. 209.

<sup>206</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1163.

originally undertaken”.<sup>207</sup> The condition does not require that the obligations to be performed have become impossible, such an impossibility would rather fall under Article 61 of the VCLT.<sup>208</sup> The question is whether UK’s obligation arising from the EEA Agreement can be considered essentially different once it is no longer a Member State of the EU. One could argue that the answer lies in the future agreement between the EU and the UK. If the UK were to retain its access to the internal market on similar conditions as apply now, it could reasonably be argued that the obligations arising from the EEA Agreement have not changed dramatically in order to constitute “something essentially different from that originally undertaken”. However, if no deal is reached on the future agreement between the EU and the UK, or a deal is reached which effectively sees the UK outside the internal market, it could be argued that this would leave the obligation arising from the EEA Agreement essentially different from that the UK originally undertook. It could also be argued that the situation of the UK being outside both the EU and EFTA, and therefore not participating in the organs responsible for surveillance and judicial control of the EEA Agreement, alters the obligations to be performed essentially different from those originally undertaken by the UK, thereby allowing the UK to withdraw from the EEA Agreement.

In sum, one could possibly argue that the legal situation that the UK will find itself in once it formally withdraws from the EU meets most, if not all, the conditions of a “fundamental change of circumstances” according to Article 62 of the VCLT. But even though such an argument were to be successful, the rule found in Article 27 of the VCLT would render such an argument ineffective. Article 27 strengthens and reaffirms the fundamental principle of *pacta sunt servanda* found in Article 26, by prohibiting States to invoke its internal law as an excuse for its failure to perform a treaty and to encourage States to ensure that its internal laws are compatible with its international obligations.<sup>209</sup> By triggering Article 50 TEU the UK invoked its internal law thereby rendering any arguments for a fundamental change of circumstances unsuccessful.

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<sup>207</sup> ICJ, *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgement, I.C.J. Reports 1974, p. 3, para 43.

<sup>208</sup> Oliver Dörr, Kristen Schmalenbach: *Vienna Convention on the Law of Treaties: A Commentary*, p. 1164.

<sup>209</sup> Mark E. Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p. 372.

## **6 Conclusions on Part III**

The silences of the EEA Agreement on the effects of a Contracting Party withdrawing from the EEA Agreement has very little to no meaning concerning the question whether the UK can retain its Contracting Party Status, post-Brexit. This silence finds its roots in the historical relationship between the EU and the EEA Agreement. The Treaties of the EU have since early history always been silent on the legal effects of a Member State withdrawing the Union and the leading legal opinion has historically been that such a withdrawal was not possible. With the introduction of the Lisbon Treaty, Article 50 was born thus allowing Member States to unilaterally withdrawing from the EU. Despite this the EEA Agreement remained silent on the effects of a Contracting Party withdrawing from the EU. This silence of the EEA Agreement has mainly two convincing explanations. First is the fact that a withdrawal in accordance with Article 50 was considered an unlikely scenario that did not need to be addressed in EEA law. Second is that the Contracting Parties to the Agreement simply considered a membership to the EU or EFTA as a necessary precondition for a Contracting Party Status to the Agreement, and therefore if a Contracting Party were to withdraw from either organisation it would entail the automatic cessation of its Contracting Party Status. Whatever the reason maybe it is certain that it was never the will of the Contracting Parties that a withdrawal from the EU was to have no effect on the EEA Agreement.

While Article 50 TEU does not have direct effect on Article 127 EEA and a notification of withdrawal from the EU cannot be considered as a notification of withdrawal from the EEA Agreement, the overall consequences of invoking Article 50 TEU cannot be ignored, which is that the EU Treaties will cease to apply to the withdrawing State. The EEA Agreement makes it clear on number of occasions that a Contracting Party Status is limited to “EFTA States” and “EC Member States”. This conclusion finds further support in the two-pillar structure of the Agreement where access to the organs responsible for surveillance and judicial control of the EEA Agreements is limited to the EU Member States and the EFTA States.

The two-pillar structure was a solution to a fairly complicated problem between the EEA-EFTA States and the EU and its Member States. While the EFTA States wanted access to the internal market of the EU without transferring any sovereign powers to EU institutions, the EU wanted to preserve its autonomy. To ensure the homogeneous application of EEA/EU law throughout the internal market a supervisory and judicial system had to be set up that would ensure that the EEA-EFTA States would comply with their obligations arising from the Agreement. This led to the creation of ESA and the EFTA Court with the conclusion of the SC

Agreement. The SC Agreement limits accession to EFTA States since the purpose of the SC Agreement is to serve as a surveillance and judicial mechanism for the EFTA-pillar of the EEA Agreement.

While one can agree with the argument that a limitation on UK's accession to the SC Agreement is not by itself a decisive factor in the question whether the UK can retain its Contracting Party Status to the Agreement post-Brexit, it serves as a strong indicator supported by the main text of the EEA Agreement, that a Contracting Party Status is limited to EU Member States and EFTA States only.

The EFTA Court, along with its sister court the CJEU, has played a central role in ensuring the homogeneous application of EEA law where the former has gone to great lengths to ensure that individuals and market operators in the EEA-EFTA States enjoy similar rights under EEA law as individuals and market operators in the EU Member States enjoy under EU law. A Contracting Party that has no access to any of the organs responsible for the surveillance and judicial control of the Agreement would severely endanger the homogeneous application of EEA law and the proper functioning of the Agreement as a whole.

The two-pillar structure is enshrined throughout the main text of the Agreement and is not only limited to the organs responsible for surveillance and judicial control. Article 2 EEA defines the meaning of a "Contracting Party" under the Agreement. Article 2(b) provides that the term "EFTA States" means Iceland, the Principality of Liechtenstein and the Kingdom of Norway, while the term "Contracting Parties" concerning the EU and its Member States means, the EU and the EU Member States, or the EU, or the EU Member States. The meaning behind the rather complex definition of a Contracting Party concerning the EU is rooted in the flow of competences between the Union and its Member States. The wording of Article 2 EEA makes it clear that Contracting Parties can only be the three EEA-EFTA States or the EU itself and the EU Member States. Nothing in the provision allows for the interpretation to include a former EU Member State. Article 2 EEA simply reinforces the two-pillar structure of the EEA Agreement and the fact that it only applies to the Member States of the EU and EFTA. Finally, a preambular list of the current Contracting Parties to the Agreement cannot override the clear intent of Article 2 and the Agreement as a whole that it only applies to Member States of the two organisations.

Furthermore, this conclusion finds strong support in Articles 126 and 128 EEA. While Article 126 limits the territorial application of the Agreement to the three EEA-EFTA States and to the territories to which the EU Treaties are currently applied, Article 128 limits accession to EU Member States and EFTA States.

Article 126 EEA is not, by itself, meant to be a decisive factor in the question whether the UK can retain its Contracting Party Status to the Agreement post-Brexit, its main function is to clear the territorial application of the Agreement, especially in those States that still hold control over special territories, where the Agreement is perhaps not meant to apply or has only limited function. By referring the matter to the EU Treaties, a heavy administrative burden is avoided since the issue has already been addressed in EU law concerning the EU Member States. The matter of the Åland Islands can simply be regarded as leftovers from Finland's Contracting Party Status to the Agreement as an EFTA State. The fact that the territorial application of the Agreement is limited to the three EEA-EFTA States and the EU Member States simply reinforces the conclusion that the UK cannot retain its Contracting Party Status to the Agreement once it formally withdraws from the EU.

The case law of the CJEU suggest that international law has very limited relevance in the EU legal order. However, the Court has noted that customary international law forms an integral part of the EU legal order and as a consequence the EEA legal order. However, the Court has made it clear that it does not follow the interpretation method enshrined in Article 31 and 32 of the VCLT but has developed its own interpretation method. The EFTA Court has noted that due to the objective of creating a dynamic and homogeneous European Economic Area, a dynamic interpretation of EEA law may be necessary. While the EFTA Court and the CJEU would rely on an objective based interpretation approach when examining whether the text of the EEA Agreement can be reconciled with the post-Brexit situation of the UK, they would go much further than simply looking at the objective of strengthening trade between the Contracting Parties and consider the overall goal of creating a homogeneous and dynamic internal market.

In the light of the arguments presented above and despite the fact that the UK will not trigger Article 127 EEA and formally withdraw from the Agreement, the legal conclusion to the question whether the UK can retain its Contracting Party Status to the EEA Agreement post-Brexit has to be answered in the negative.

Finally, whether or not the UK or the other Contracting Parties to the Agreement could rely on additional arguments of international law to argue that the Agreement ceases to apply to the UK post-Brexit is not of a major concern. The unavoidable legal conclusion is that due to the wording of the EEA Agreements and its two-pillar structure, UK's withdrawal from the EU will as a consequence result in a loss of its Contracting Party Status to the EEA Agreement. Furthermore, the political consensus between the EU and the UK on the latter's withdrawal

from the external agreements of the EU post-Brexit, indicate that this will not be a legal issue, but mainly a political one.

## **Part IV - The UK wishes to remain a Contracting Party to the EEA Agreement**

### **1 Introduction**

The third legal option facing the UK concerning its future Contracting Status to the EEA Agreement is to remain a Contracting Party and have the Agreement modified in order to reflect the new reality of a Contracting Party that is neither a Member State of the EU nor EFTA. This would require that the UK would have to negotiate with the other Contracting Parties and conclude an agreement setting out the necessary modification to the EEA Agreement, its Protocols and Annexes, and relating Agreements and documents.

While it is acknowledged that the best legal option for the UK would be to re-join EFTA and then apply to become a party to the EEA Agreement, this part will examine the necessary amendments to the Agreement in the context of UK remaining outside of EFTA.

Furthermore, this part will only examine some of the possible modifications that the author considers have to be made to the main text of the EEA Agreement, the SC Agreement and related documents. This examination is in no way meant to be an exhaustive list of necessary modifications, since that would be a very daunting task, not only due to the legal complications and lack of precedence, but mostly due to the political complexity that it entails.

Chapter 2 examines the provisions of the main text of the EEA Agreement that may have to be amended in order to accommodate for the new reality of UK being a Contracting Party both outside of the EU and EFTA. Chapter 3 examines the possible modification that may need to be made in order to allow the UK to be represented in the four organs established by the EEA Agreement. Chapter 4 examines UK's possible participation in ESA and the EFTA Court and the amendments that may have to be made to the relevant SC Agreement, while Chapter 5 will examine the agreements on the EFTA Standing Committee on the one hand, and the Committee of Members of Parliament of the EFTA States, on the other. Finally, chapter six summarizes the main conclusions of Part IV.

### **2 Necessary modifications to the main text of the EEA Agreement**

In order for the UK to continue its participation in the EEA Agreement, post-Brexit, some modifications would have to be made to the main text of the Agreement to erase all doubt as to the legality of UK's Contracting Party Status and ensure the proper functioning of the Agreement.

First, the definition of a Contracting Party in Article 2(c) has to be amended in order to allow a former EU Member State to participate in the Agreement. The provision provides for a definition of a “Contracting Party” concerning the EU and its Member States. As mentioned above this rather complex definition is to be understood on the background of distribution of competences between the EU and its Member States. While Article 2(c) defines the term “Contracting Parties” concerning the EU and its Member States, Article 2(b) defines the term “EFTA State” as meaning Iceland, Liechtenstein and Norway. Nothing in Article 2 provides for the option of interpreting the term “Contracting Parties” as meaning anything other than the three EFTA States or the EU and its Member States, either separately or in conjunction.

A minor modification to Article 2 could allow the term “Contracting Parties” to include the UK after it formally withdraws from the EU. For example, a new provision could be added to Article 2 stating something in the line of: *In addition, the term “Contracting Parties” includes the United Kingdom of Great Britain and Northern Ireland.* Therefore, instead of belonging in Article 2(c) as a Member State of the EU, the UK could remain a Contracting Party of its own right similarly to the three EFTA States, only remaining outside of EFTA. Another example of a possible modification would be to include the UK in the definition of the term “EFTA States”. If the UK were to accede to the SC Agreement and participate in ESA and the EFTA Court the UK could simply move from the EU pillar of the Agreement to the EFTA pillar. In order for the UK to accede to the SC Agreement they would first need to become an EFTA Member State.<sup>210</sup> However if the three EEA-EFTA States were to amend the SC Agreement to allow the UK to accede to it without becoming an EFTA State, the UK could simply remain outside of EFTA but move into the EFTA pillar-side of the EEA Agreement. Whether or not the UK accedes to the SC Agreement, the term “EFTA States” in Article 2(b) could be amended to include the UK. As a Contracting Party outside the EU, the UK would belong to the EFTA-pillar of the Agreement, as one of the Contracting Parties expected to incorporate EEA law stemming from the creators of EEA law; the EU and its Member States. Then, the term “EFTA States” in Article 2(b) would simply list the four States belonging to the second pillar of the Agreement by adding the UK to the list. By including the UK in the definition of Contracting Parties under the definition of “EFTA States”, a heavy administrative burden would be avoided since the text of the Agreement repeatedly refers to the terms “EC Member States” and “EFTA States”. However, if the UK were to be included in the definition of Contracting Parties in a separate provision extending the definition to include the UK, the terms “EC Member States”

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<sup>210</sup> The SC Agreement currently limits accession to EFTA Member States. Without any modifications the UK would first have to become a EFTA Member State before it could accede to the SC Agreement.

and “EFTA States” could simply be interpreted as meaning all the Contracting Parties without regards to their membership of the EU or EFTA.

Second, the provision on the territorial application of the EEA Agreement will have to be amended. Article 126(1) EEA provides that the Agreement applies to the territories which the Treaty establishing the European Economic Community is applied and the territories of the three EEA-EFTA States. As was described above, once the UK formally withdraws from the EU, and the EU Treaties cease to apply to it, it will no longer fulfil the territorial conditions of Article 126(1) EEA. In order to accommodate for UK’s continuing participation in the Agreement post-Brexit the provision could be amended to include the territories of the UK. Professor George Yarrow has suggested that Article 126(1) could be amended in the following manner: “*The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is or has been applied ...*”.<sup>211</sup> This would certainly overcome the territorial issue of the UK once the EU treaties formally cease to apply to it. Furthermore, this would avoid a heavy administrative burden, since the EU Treaties have already gone through the process of defining the territorial application of EU/EEA law in all territories of its Member States. Another example would be to leave the territorial application of the EU Treaties as it is and add the UK to the list behind the three EEA-EFTA States. Article 126(1) could then state: “*... and to the territories of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland.*” In this scenario the territorial application of the EEA Agreement in the special territories of the UK would have to be addressed independently, much like the territorial issue of the Åland Islands is addressed in Article 126(2). This could be a rather complex task since the UK holds a number of special territories, many of whom would need to be addressed independently and either added in Article 126 EEA along with the territorial issue of the Åland Islands or as a special annex to the Agreement.

Many of the Protocols and Annexes to the EEA Agreement would either need to be amended or interpreted in such a way as to accommodate the new reality of the UK being outside the EU. The logical thing would be to consider the UK belonging to the EFTA pillar of the Agreement and interpret the term “EFTA States” as to include the UK. This would avoid a heavy administrative burden since most Protocols and Annexes refer to “EC Member States” and/or “EFTA States”. However, such an interpretation is not always possible, and therefore amendments to some Protocols and Annexes would have to take place.

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<sup>211</sup> George Yarrow: “Brexit and the Single Market”, (2016), p. 27.

Article 129(2) EEA provides that “the Agreement shall be ratified or approved by the Contracting Parties in accordance with their respective constitutional requirements.” In addition, Article 127(2) EEA provides that immediately after a notification of a withdrawal from the Agreement, “the other Contracting Parties shall convene a diplomatic conference in order to envisage the necessary modifications to the Agreement.” Whether or not the UK formally withdraws from the Agreement in accordance with Article 127 EEA, one would assume that the Contracting Parties would convene a diplomatic conference in order to conclude an agreement, setting out the necessary modification to the main text of the Agreement and perhaps the SC Agreement as well, along with other modifications that the Contracting Parties would deem necessary. This would especially be the case if the UK were to wish to retain its Contracting Party Status to the Agreement, since the matter of UK’s participation in the organs responsible for surveillance and judicial control would need to be addressed to safeguard the homogeneous application of EEA law.

Finally, UK’s possible continuing Contracting Party Status to the EEA Agreement should also be considered in the context of the negotiations between the EU and the UK on the latter’s withdrawal from the EU.<sup>212</sup> While the DWA did not mention the EEA Agreement explicitly, the possibility remains that the agreement on the future relationship between the UK and the EU could have major effect on the EEA Agreement, even including UK’s possible future participation in the Agreement. However, any changes to the main text of the Agreement facilitating UK’s continuing Contracting Party Status would need to be approved and ratified in accordance with the constitutional requirements of each of the Contracting Parties. In essence, that means that the EU, each of the EU Member States, and the three EEA-EFTA would have to agree to these amendments, therefore giving each of them a veto power to UK’s potential continuing Contracting Party Status to the EEA Agreement.

### **3 UK’s access to the organs responsible for surveillance and judicial control of the EEA Agreement**

As a Contracting Party to the EEA Agreement the UK is currently represented in the organs responsible for overseeing implementation, surveillance and judicial control of the EEA Agreement through EU institutions. Once the UK formally withdraws from the EU it will need to have its own representation in these organs. Four of these organs were established by the

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<sup>212</sup> See 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”, p. 12.

EEA Agreement when it came into force, while two were established by a separate Agreement, the SC Agreement.

The EEA Council was established in accordance with Article 89(1) EEA. According to Article 90(1) EEA: “The EEA Council shall consist of the members of the Council of the European Communities and members of the EC Commission, and of one member of the Government of each of the EFTA States.” Post-Brexit Article 90(1) will either need to be interpreted as including the UK or amended in order to accommodate for the change of circumstances. The term “EFTA States” could simply be interpreted as including the UK, as a member of the EEA-EFTA pillar of the Agreement, and therefore, no amendments are needed, or the provision could be amended in the following manner: “*The EEA Council shall consist of the members of the Council of the European Communities and members of the EC Commission, and of one member of the Government of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland.*” Regardless of the path taken, the fact is that the UK would be represented in the EEA Council by its respective minister of foreign or European affairs.

The EEA Joint Committee was established in accordance with Article 92(1) EEA. Article 93(1) provides that the Committee “shall consist of representatives of the Contracting Parties.” Unlike Article 90(1) the provision uses the term “Contracting Parties”, therefore, following the amendments made to the term “Contracting Parties” in Article 2 EEA, no amendments would have to be made to Article 93(1) EEA. The term would simply be interpreted as including the UK in accordance with the amended definition of a “Contracting Party” in Article 2 EEA. The EEA Joint Committee currently consists of representatives of the EEAS on behalf of the EU and by ambassadors of the EEA-EFTA States. Post-Brexit, the UK would simply be represented in the EEA Joint Committee by its own ambassador in accordance with Article 93(1) EEA.

The EEA Joint Parliamentary Committee was established in accordance with Article 95(1). The second sentence of Article 95(1) states that the Committee “shall be composed of equal numbers of, on the one hand, members of the European Parliament and, on the other, members of Parliaments of the EFTA States.” The total number of members of the Committee is laid down in Protocol 36 on the Statute of the EEA Joint Parliamentary Committee. Article 2 of Protocol 36 provides that the Committee shall consist of twenty-four members. Therefore, currently the European Parliament appoints twelve members and each parliament of the three EEA-EFTA appoints four members. Post-Brexit the meaning given to the term “Parliaments of the EFTA States” would have to be interpreted as including the UK or the provision would need to be amended to include the parliament of the UK. This could be done by amending the

provision to read: “... *members of Parliaments of the EFTA States and the United Kingdom of Great Britain and Northern Ireland.*” Instead of being represented by the European Parliament, the UK parliament would appoint its own members. Also, instead of appointing 4 members, the EEA-EFTA States (including the UK) would appoint 3 members each in order to ensure the equal representation between the European Parliament and the Parliaments of the EFTA States. However, amendments could be made to Protocol 36 to allow for more members of each parliament, for example, increase the members of the Committee to twenty-eight, so that each EEA-EFTA State (including the UK) would continue to appoint four members and the European Parliament would appoint sixteen members.

Finally, is the EEA Consultative Committee which was established in accordance with Article 96(2) EEA. According to Article 96(2) the Committee shall consists of “equal numbers of, on the one hand, members from the Economic and Social Committee of the Community and, on the other, members of the EFTA Consultative Committee.” According to Article 1 of the rules of procedure of the Committee it shall consist of twenty-four members, twelve appointed by the European Economic and Social Committee and twelve by the EFTA Consultative Committee. The EFTA Consultative Committee consists of the four members of the EFTA Countries, Iceland, Liechtenstein, Norway and Switzerland, however, only the three EEA-EFTA States can designate a member to the Committee.<sup>213</sup> Article 3 of the rules of procedure provides that the Committee shall be appointed by the European Economic and Social Committee and the EFTA Consultative Committee and that they can only appoint members to the EEA Consultative Committee from among their own members. Outside of EFTA the UK would not have access to the EFTA Consultative Committee, and therefore Article 3 of the rules of procedure would need to be amended in order to allow the UK to appoint its own members. Furthermore, Article 1 of the rules of procedure of the Committee would also need to be amended, either by allowing the EFTA Consultative Committee to appoint nine members and the UK three or by increasing the total members of the Committee to thirty-two, thereby allowing the European Economic and Social Committee to appoint sixteen members, and the EFTA Consultative Committee and the UK to appoint the remaining sixteen members.

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<sup>213</sup> See Article 3 of the Rules of Procedure of the EEA Consultative Committee, 12 May 2011, Ref. 1084274.

#### **4 UK's possible accession to the Surveillance and Court Agreement**

The two most vital organs responsible for surveillance and judicial control of the EEA Agreement, on the EEA-EFTA pillar side, are ESA and the EFTA Court. Unlike the four organs mentioned above, ESA and the EFTA Court were not established by the EEA Agreement, they were established by a separate Agreement. Article 108(1) and (2) EEA provide that the EFTA States shall establish an independent surveillance authority (ESA) and a court of justice (EFTA Court). In accordance with the EEA Agreement the three EEA-EFTA States concluded an Agreement establishing these two organs.<sup>214</sup> The SC Agreement is a treaty between the three EEA-EFTA States and does not include the EU nor its Member States. This is due to the obvious fact that the EU and its Member States rely on EU institutions to oversee these tasks on the EU-pillar side of the EEA Agreement.

Once the UK formally withdraws from the EU and the EU Treaties cease to apply to it, it will no longer have any representation in any of the organs responsible for surveillance and judicial control of the EEA Agreement, furthermore, none of these organs will have jurisdiction over UK's actions concerning the Agreement. Therefore, it would not only be important for the UK to have access to these institutions but also for the other Contracting Parties to ensure that the UK follows EEA law in accordance with the EEA Agreement.

According to Article 51 of the SC Agreement, accession is limited to EFTA Member States. Therefore, without any amendments to the Agreement, the UK cannot accede to it, unless it first becomes a Member State of EFTA. The UK could apply to become an EFTA State, once again, in accordance with Article 56 of the EFTA Convention and then apply to become a party to the EEA Agreement, at which point it would need accede to the SC Agreement in accordance with Article 51 of that Agreement. The other option would be to have the SC Agreement amended in order to allow the UK to accede to it. Article 49 of the SC Agreement provides that the governments of the EEA-EFTA States can amend the main Agreement, and therefore allow the UK to accede to it and formally participate in ESA and the EFTA Court. This could be done, for example, by adding a provision to Article 51 of the SC Agreement which could read: *Any State withdrawing from the European Union can accede to the present Agreement on such terms and conditions as may be laid down by an agreement between the EFTA States and that State.* This would allow the UK to remain outside both the EU and EFTA but retain its status as a Contracting Party to the EEA Agreement, while still having a seat at the organs responsible

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<sup>214</sup> See Article 4 and 27 of the SC Agreement.

for the surveillance and judicial control of the Agreement. This would simply mean that the UK would move from the EU-pillar of the EEA Agreement to the EFTA pillar.

UK's accession to the SC Agreement would also require some minor institutional changes to ESA and the EFTA Court to allow for UK's representation in these organs. First, Article 7 of the SC Agreement provides that ESA shall consist of three members. According to Article 9 these members "shall be appointed by common accord of the Governments of the EFTA States." Therefore, Article 7 would need to be amended to allow the UK to appoint its member of ESA by increasing the members of ESA to four. Second, Article 28 of the SC Agreement provides that the EFTA Court shall consist of three judges. According to Article 30, "they shall be appointed by common accord of the Governments of the EFTA States". Despite the fact that the SC Agreement does not put any requirements on the nationality of the judges of the EFTA Court, the EFTA States routinely appoint judges based on their nationality, thereby, Article 28 would need to be amended to allow the UK to appoint its own judge at the Court, by increasing the number of judges to four.

## **5 Agreements related to the EEA Agreement**

Alongside the ratification of the EEA Agreement and the SC Agreement, the three EEA-EFTA States signed two additional agreements, the Agreement on a Standing Committee of the EFTA States and the Agreement on a Committee of Members of Parliament of the EFTA States. The former established the EFTA Standing Committee (EFTA SC) which is responsible for carrying out functions in respect of decision-making, administration and management of the EEA Agreement. The latter established the Committee of Members of Parliament of the EFTA States (EFTA MPC) which serves as a consultative body to the EFTA States on matters relevant to the EEA.

In order to allow the UK to participate in these organs after it formally withdraws from the EU several amendments will have to be made to these Agreements.

Article 13 of the Agreement on the EFTA SC limits accession to EFTA member States, thereby, in order to allow the UK to accede to it without being in EFTA, an amendment has to be made. Such an amendment could, for example, provide that any State withdrawing from the EU may accede to the present agreement. Furthermore, Article 1(2)(b) of the Agreement would also have to be amended to include the UK in the definition of the term "EFTA States", unless a simultaneous amendment is made to Article 2 EEA, defining the UK as an "EFTA State".

Concerning the Agreement on the EFTA MPC, Article 1 would have to be amended in order to allow the UK parliament to appoint its own members to the EFTA SC. Furthermore, Article 2 would also have to be amended to include the UK in the definition of the term “EFTA State”, unless a simultaneous amendment is made to Article 2 EEA, defining the UK as an “EFTA State”. Finally, Article 14 would have to be amended in order to allow the UK to accede to the Agreement but currently such accession is limited to EFTA States acceding to the EEA Agreement.

These amendments could be made following negotiations between the UK and the three EEA-EFTA States, concerning UK’s possible accession to the EEA Agreement, however these agreements are classic international treaties and would not have to be ratified in the same manner as the changes made to the main text of the EEA Agreement.

## **6 Conclusions on Part IV**

The most important amendments that would have to be made to the main text of the EEA Agreement to accommodate for UK’s Contracting Party Status while remaining outside of the EU and EFTA, are mainly two.

First, Article 2 would have to be amended in order to include the UK. This could be done by amending Article 2(b) by including the UK in the term “EFTA States” with the other three EEA-EFTA States. This could also be done by creating a new provision under Article 2 adding that the term “Contracting Parties” also includes the UK. However, due to the repeated reference of the Agreement to either “EC Member States” and/or “EFTA States” the former amendment should be preferred.

Second, is Article 126 EEA which sets out the territorial application of the Agreement. An amendment to Article 126(1) could be made that would provide that the EEA Agreement applies to the territories to which the EU treaties apply or have been applied. Another example would be to simply add the UK behind the other EEA-EFTA States, however, that would entail that the issue of UK’s special territories would have to be addressed independently much like the territorial issue of the Åland Islands is addressed in Article 126(2).

Furthermore, minor amendments would have to be made in order to allow the UK to participate in the EEA-EFTA organs. These amendments mainly involve changing the dynamic of the members of these organs or changing the overall number of these members. Finally, a number of amendments would have to be made to the Annexes and Protocols to the Agreement.

The amendments to the main text of the EEA Agreement, described above, would have to be approved and ratified by each of the Contracting Parties in accordance with their own constitutional requirements, essentially requiring the approval of each of the EEA-EFTA States, and in addition the EU and each of the EU Member States.

Finally, and most importantly, amendments would have to be made to the SC Agreement in order to allow the UK to participate in ESA and the EFTA Court. Article 51 of the SC Agreement limits accession to EFTA States which would have to be amended in order to allow the UK to accede to the Agreement. This could be done by including a provision stating that any State withdrawing from the EU could accede to the Agreement. Furthermore, some minor institutional changes would have to be made to ESA and the EFTA Court to allow for UK's representation in these organs.

This chapter does not provide an exhaustive list of the necessary amendments that would need to be made in order to allow the UK to participate in the EEA Agreement without being a member of either the EU nor EFTA. In order to do so a thorough analysis of the EEA Agreement, SC Agreement and relevant Annexes and Protocols would have to be made to envisage the necessary modifications. Furthermore, such an analysis would be riddled with uncertainties due to the lack of precedence and the political complexities that the whole process would entail.

## **Part V - Final conclusions and thoughts**

In my short experience as a student of European law I have, on multiple occasions, been presented with a fundamental misunderstanding of the EEA Agreement and the EEA legal order, not only among ordinary people but among law students and lawyers. During my exchange studies at KU Leuven in Belgium, I met many European law students, many of which had never heard of the EEA Agreement despite having deep knowledge of the EU legal order, while others had heard of the Agreement but were of the notion that it simply belonged to the EU legal order or was simply a classic international treaty falling under the auspices of public international law.

Throughout my research for this thesis and by following the legal and political discussion concerning UK's withdrawal from the EU and UK's possible future relationship with the EU, I have noticed that the arguments put forward for UK's continuing Contracting Party Status to the EEA Agreement, post-Brexit, are based on a fundamental misunderstanding of the EEA Agreement and the EEA legal order. Even legal scholars seem to ignore the fact that the EEA Agreement is an international treaty *sui generis*, and that the institutional setup of the Agreement, based on its two-pillar system, represents a fine balance between the two legal orders, where on one side the participating States were not willing to formally transfer any of their sovereign powers to international institutions, while the other side is based on the formal transfer of sovereign powers to international institutions. After Brexit the UK will formally cease to belong to the EU and without acceding to EFTA it cannot retain its Contracting Party Status to the EEA Agreement.

Brexit does not only mean UK's withdrawal from the EU but also from the EEA Agreement, both politically and legally. While the political consensus is that the UK will automatically cease to be a party to the EEA Agreement, post-Brexit, and thereby there is no need to formally trigger Article 127 EEA, the legal grounds for UK's withdrawal from the Agreement remain, somewhat, unanswered. Article 127 EEA clearly provides that a Contracting Party may withdraw from the Agreement and nothing in EEA law nor EU law suggests that a withdrawal from the Agreement can be considered obligatory. However, due to the close relationship between the two legal orders and the importance of legal certainty, one has to conclude that the UK should in fact trigger Article 127 EEA and formally withdraw from the Agreement. However, UK's failure to do so will not result in any consequences on their part. Furthermore, UK's failure to formally withdraw from the EEA Agreement could create a dangerous legal precedence where, for example, if Iceland were to come to the political conclusion that it should

withdraw from the EEA Agreement, would it be required to trigger Article 127 EEA while the UK is not?

Despite the limited relevance of public international law concerning UK's Contracting Party Status to the EEA Agreement post-Brexit one cannot ignore the lack of legal grounds for UK's withdrawal from the EEA Agreement. Without triggering Article 127 EEA the only legal grounds that the UK and the other Contracting Parties to the Agreement can rely on is the simple fact that the UK will no longer fulfil the conditions set out in the EEA Agreement for a Contracting Party Status. The VCLT provides for two possible options to support the legal argument that the Agreement should cease to apply to the UK post-Brexit. First, UK's withdrawal from the Agreement without formally triggering Article 127 EEA could be considered a material breach of the Agreement in light of Article 60(3)(a) of the VCLT, or by not belonging to either of the two pillars of the Agreement the UK could be violating provisions that are essential to the accomplishment of the object and purpose of the Agreement, thereby, amounting to a material breach of the Agreement in light of Article 60(3)(b) of the VCLT. The second option would be for the UK to argue for the impossibility of performance in accordance with Article 61 of the VCLT. Such an argument would depend on whether the two-pillar structure and more precisely the organs responsible for surveillance and judicial control of the Agreement can be considered as objects indispensable for the execution of the EEA Agreement.

The legal and political conclusion is that the UK cannot retain its Contracting Party Status to the EEA Agreement, post-Brexit, thereby making it evident that once the UK formally withdraws from the EU it will no longer participate in the EEA Agreement. However, the withdrawal negotiations currently taking place between the EU and the UK are of great interest to the EEA-EFTA Countries and the EEA Agreement. Any agreement, both concerning the transition period, and the future relationship between the EU and the UK should take due account of the interest of EEA law and the EEA-EFTA States. The importance of the homogeneous application of EEA law throughout the internal market requires that EEA citizens and market operators are not discriminated against when exercising their EEA derived rights, as opposed to EU citizens and market operators. The EEA-EFTA States should use their influence in the negotiations to ensure that the final withdrawal agreement between the EU and the UK takes due account of EEA law and the interests of EEA citizens and market operators.

Concerning the future relationship between the EU and the UK, the possibility remains that the UK were to accede to the EEA Agreement. Aside from the political issues, such as whether the three EEA-EFTA States or even the EU itself, were to agree to UK's accession to the EEA Agreement, the legal issue remains that the UK would first have to re-accede to EFTA before

it could apply for a Contracting Party Status to the EEA Agreement, following which it would be under an obligation to accede to the SC Agreement. This process would require the approval of all the EEA Contracting Parties, essentially giving each of them a veto power on UK's accession to the EEA Agreement. However, if it were the will of the UK to continue to participate in the EEA Agreement, that would in all likelihood be dealt with in the second phase of the withdrawal negotiations, requiring that the three EEA-EFTA States would have to participate in such negotiations.

Whatever the future relationship between the EU and the UK will entail, it will most certainly leave a long-standing impact on EU and EEA citizens and market operators. The EEA Agreement has proved quite successful in ensuring the homogeneous application of EEA law throughout the single market and strengthening trade and economic relations between the Contracting Parties. Not only is UK one of Iceland's and Norway's most important markets, but also the UK relies heavily on gas and oil imports from Norway. UK's withdrawal from the EU could severely impair, not only the economy of the UK itself, but also the economies of Iceland and Norway. This emphasizes the importance of ensuring that Brexit leaves as little impact on trade between the UK and its European neighbours as possible, where the only logical solution would be for the UK to stay in the single market post-Brexit, either by becoming an EFTA State and re-acceding to the EEA Agreement, or by concluding a free trade agreement with the EU that would extend throughout the internal market.

In its guidelines on the future relationship between the EU and the UK, the EU Council expresses its readiness to negotiate a wide-ranging free trade agreement that would address, *inter alia*, trade in goods, trade in services and provisions on movement of natural persons.<sup>215</sup> The EEA-EFTA States should use this ample opportunity to clarify their interests on this matter and ensure that such a free trade agreement would apply to them as well, especially in the light of the fact that if the EU and the UK were to fail to reach an agreement, the UK and the three EEA-EFTA States would have to wait until the UK formally ceases to be an EU Members State in order to begin negotiations on a future trade deal.<sup>216</sup>

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<sup>215</sup> European Council (Art. 50) guidelines on the framework for the future EU-UK relationship. 23 March 2018, EUCO XT 20001/18, para 7-10.

<sup>216</sup> The UK is bound by the duty of sincere cooperation in accordance with Article 4(3) TEU. Furthermore, the EEA-EFTA States are also bound by a duty of cooperation as enshrined in Article 3 EEA.

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