

UK QUO VADIS?

THE EEA AS A WORKABLE FRAMEWORK

Seminar Report

THE EUROPEAN CIRCUIT



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On 3 February 2017, the University of Sheffield School of Law—in co-operation with the UK Constitutional Law Association and the European Circuit of the Bar—hosted a seminar. The keynote speaker was Michael-James Clifton, a barrister and now *Chef de Cabinet* in the Chambers of the President of the EFTA Court, Professor Carl Baudenbacher. The EFTA Court—based in Luxembourg—fulfils the judicial function within the EFTA system, interpreting the Agreement on the European Economic Area with regard to the EFTA States party to the Agreement (currently Iceland, Liechtenstein, and Norway). The EEA/EFTA model (often referred to as the ‘Norwegian model’ in UK discussions) has frequently been mentioned as a possible route forward for a post-Brexit UK. However, little is known about the EEA/EFTA model in the UK. The seminar was thus designed to raise awareness of the model in the UK, and to consider how the EEA could form the basis for the future relationship between the EU and the UK. As the Prime Minister has given notice under Article 50 TEU, the contents of the paper remain highly relevant.

Mr. Clifton’s paper, given in a personal capacity, assesses the conceivable options for the UK to forge a mature, co-operative relationship with the remainder of the EU and beyond. It considers the white papers published by the UK Government and the devolved administrations of Wales and Scotland against the background of the potential post-Brexit models mooted since the referendum: the EEA as it presently stands, the institutionalised Swiss model (including ‘docking’), a potential bespoke FTA, and the WTO. It takes as a working assumption that the two-year negotiation window provided for by Article 50 TEU is unlikely to be extended. Evaluating the options, it concludes that an updated version of the EEA Agreement could be a natural home for the UK post Brexit: a solution which could also be in the interests of the EU, EEA/EFTA States and potentially Switzerland.

Introduction

The referendum of 23rd June has brought into sharp relief numerous fissures in British society. It has restored to the public's consciousness the fractious, often ambivalent, yet occasionally passionate nature of the UK's historical relationship with its neighbouring countries. The seemingly irreconcilable views of certain Leavers and Remainers continue to be expressed vehemently, even as the Article 50 bill goes through Parliament. The divisive nature of the political debate as it echoes and reverberates across the country does little to further the debate of the most important questions to face the UK in the recent past: what form of relationship should the UK have with the European Union in the future? What should be the basis of what the Prime Minister has described as a 'mature, cooperative relationship'? Most vitally, how can the UK achieve the best possible deal?

The challenge facing the UK Government is to provide a single, harmonious basis for the UK's future relationship with remainder of the European Union and further afield, on the basis of the fractured referendum vote. To that end, the formation of two new departments formed from the ribs of the Cabinet Office and the Department of Business, Innovation and Skills continues at pace. At the same time, the devolved administrations in Edinburgh and Cardiff, particularly, have set out their own preferred visions of the UK's future relationship with 'Europe'. The contrasting starting points of the white papers is the result, perhaps, of the creation of the Department for the Exiting of the EU in contrast to the administrative continuity of the devolved governments. However, it is here also necessary to recall the referendum's results. 51.9% of the overall electorate voted to leave. Broken down, 53.4% of voters in England and 52.5% of voters in Wales voted leave; 95.9% of voters in Gibraltar, 62.0% of voters in Scotland, and 55.8% of voters in Northern Ireland voted remain.

Meanwhile, at present the UK remains an EU Member State and a Contracting Party to the EEA Agreement in the EU pillar. The EEA Agreement is incorporated into domestic law through the European Economic Area Act 1993, which amended the European Communities Act 1972. The EEA Agreement extends the Single Market to EFTA States: originally seven countries but currently Iceland, Liechtenstein and Norway. The EEA Agreement contains an exit provision (Article 127 EEA) which is reasonably similar to Article 50 TEU. Article 127 EEA provides for a notice period of 12 months to be followed by an international conference.

Following the Supreme Court's judgment in *Miller*, the Government's bill authorising the Prime Minister to make an Article 50 TEU notification has gone from the Commons to the House of Lords. The Divisional Court has also dismissed as premature the so-called 'Article 127 EEA' litigation which followed on the coattails of *Miller*. Nevertheless, as a standalone and independent treaty which creates its own *sui generis* legal order, it would seem reasonable that the UK must make an Article 127 EEA notification or be in breach of its international obligations should the Government wish to no longer be a party to the Agreement. The third piece of litigation is being brought before the High Court in Dublin. This action, initiated by Jolyon Maugham QC, seeks a reference to be made to the Court of Justice of the European Union to determine whether, as a matter of EU law, an Article 50 TEU notification is revocable. A hearing is scheduled for April. Should the action be deemed admissible and a reference made to Court of Justice of the European Union, it is probable that the case would be addressed in plenary.

This article will seek to set out the options outlined in the three white papers against the background of existing relationship models with

the European Union together with their advantages and pitfalls.

Scotland, Wales, Northern Ireland, and Westminster

The Scottish Government's white paper 'Scotland's Place in Europe' puts forward two options. The first, and preferred option, is for the UK to leave the EU but to be in the European Economic Area and thereby remain in the Single Market, as well as for the UK to remain inside the EU customs union. Should the UK Government determine that the UK should also leave the Single Market, the Scottish Government contends that the UK should in any event remain in the EU customs union. The second option put forward is characterised as 'differentiated solutions for Scotland'. In this scenario, the UK Government would enable Scotland to remain part of the Single Market by 'sponsoring' Scotland's membership of the European Free Trade Association ('EFTA'), and hence for Scotland to have some form of associated membership of the EEA Agreement in its own right in due course making use of the EFTA Surveillance Authority ('ESA') and the EFTA Court.

The Welsh Government's white paper 'Securing Wales' Future: Transition from the European Union to a new relationship with Europe' was jointly developed with Plaid Cymru. The Welsh Government takes note of the two-year negotiation window provided for by Article 50 of the Treaty on the European Union ('TEU') and considers it essential that transitional arrangements should form part of the Article 50 TEU negotiations, and that the UK should remain a part of the Single Market and customs union at least for that period. The Welsh Government contends that the benefits of continued Single Market access might be achieved on a transitional basis through continued membership of the EEA, with an application for EFTA membership as required.

More fully, and in the longer term, the Welsh Government contends that the UK should remain in the Single Market for goods (including agricultural and fisheries), services and capital, whether as an EFTA member of the EEA, or by means of a negotiated bespoke arrangement unique to the UK. As regards the 'fourth freedom', the free movement of persons, the Welsh Government proposes reciprocal free movement of persons i.e. for students, those with independent means, and for free movement, more broadly, to be linked to employment. As Wales is a net recipient of EU funding, it is proposed that this funding be replaced by an increase in the Block Grant and that the UK should continue to take part in, *inter alia*, the common Erasmus+ and Horizon 2020 programmes, and to remain a constituent member of the European Investment Bank. Leaving the European Union should not impact upon present social and environmental protections or values, and the paper asserts that the Working Time Directive should be maintained. Finally, the Welsh Government puts forward the need for revised UK governmental structures to take account of the 'repatriation' of certain powers from Brussels and for the government of the UK as a whole to become more federal in nature.

The Northern Irish Executive has not published a White Paper on leaving the European Union, although the then First, and Deputy First, Ministers wrote to the Prime Minister setting out the key priorities for Northern Ireland in August 2016. Meanwhile, there is the potential of a period of direct rule being reluctantly imposed, should an Executive fail to be formed following the elections to the Northern Ireland Assembly held on 3rd March 2017. The results of the election were as follows: DUP 28 seats; Sinn Féin 27 seats; SDLP 12 seats; Ulster Unionist Party 10 seats; Alliance 8 seats; GPNI 2 seats; 1 seat for PBPA and 1 independent.

By contrast to the devolved administrations, the Prime Minister declared, at Lancaster House on 17th January, that the UK should make a ‘clean break’ from the European Union: it should leave the Single Market but remain within the customs union to a certain degree. The Prime Minister made clear that she seeks a free trade agreement with the EU that covers goods and services.

The Prime Minister also declared that she would consider the papers presented by the Scottish and Welsh Governments, so as ‘to deliver a Brexit that works for the whole of the United Kingdom.’ The meeting of the Joint Ministerial Committee on EU Negotiations on 19th January was a frosty affair with Mike Russell MSP, Scotland’s Brexit Minister, stating that all but one of the Scottish Government’s proposals had been ‘pre-emptively’ dismissed by the Lancaster House speech, the remaining option being the potential for a ‘differentiated’ arrangement for Scotland. That proposal, and similar notions put forward by politicians in Northern Ireland, have since been rejected by Westminster.

The Brexit White Paper

The UK Government’s white paper ‘The United Kingdom’s exit from and new partnership with the European Union’ is largely based on the Prime Minister’s twelve-point Lancaster House and Philadelphia speeches, but provides some additional colour. Indeed, the Prime Minister’s foreword to the white paper is taken from her speech at Lancaster House. The Government’s primary concerns are to ensure domestic control of immigration and to remove the UK from the jurisdiction of the Court of Justice of the European Union. The Prime Minister has made clear that the resolution of the Brexit negotiations will cover the entirety of the UK; no differentiated solutions, such as those proposed by the Scottish Government, will be permitted. The UK will pursue a new strategic partnership with the EU,

including an ambitious and comprehensive, deeply integrated, free trade agreement, and a new customs agreement.

As for the details, the UK will leave the Single Market but seek the ‘greatest possible access’ to it, with the *closest possible* trade in goods and services. While there should be domestic control of immigration, the Brexit negotiations should guarantee reciprocal residency rights for the remaining European Union (‘rEU’)/UK nationals. The UK will ‘take control of our own laws’ but ‘continue to cooperate on security, foreign policy and trade’ with the remainder of the EU. Beyond Single Market matters, the UK will seek a new customs arrangement with the EU. The UK will no longer be bound by the Common External Tariff or participate in the Common Commercial Policy, yet will seek to ensure that customs arrangements are ‘as frictionless as possible’. The UK may seek a completely new customs agreement or remain party to certain elements of current customs agreements, while bearing in mind the particular situation of Northern Ireland.

The Common Travel Area will be maintained, and the UK remains fully committed to the Good Friday Agreement and a strong relationship with Ireland. The UK will leave the Euratom Treaty, but the white paper does not mention the European Investment Bank. It is implied but not made clear that the UK will continue to take part in the Horizon2020 programme funding scientific research. The UK will seek to forge new free trade agreements across the world, but protect workers’ rights. Brexit will be delivered in a ‘smooth orderly’ manner with a ‘comprehensive free trade agreement’ ‘reached’ within the two-year Article 50 TEU period with a phased process of implementation in which the UK, the EU institutions and remaining Member States prepare for the new arrangements.

Given the desire to leave the jurisdiction of the Court of Justice of the European Union, the white

paper recognises that the intended UK-EU Partnership will require a dispute resolution mechanism but whose decisions should 'not have direct effect in UK law.' 'The UK will seek to agree a new approach to interpretation and dispute resolution with the EU.' Annex A to the white paper sets out six examples of models of alternative 'interpretation and dispute resolution': EU-Canada Comprehensive Economic and Trade Agreement (CETA); EU-Switzerland bilateral arrangements; the North American Free Trade Agreement (NAFTA); Mercosur; the New Zealand-Korea Free Trade Agreement 2015; and the World Trade Organisation (WTO). However, the white paper notes that these are only some examples and that 'different dispute resolution mechanisms could apply to different agreements, depending on how the new relationship with the EU is structured.' Importantly, it concludes by stating '[a]ny arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens.'

The UK Government has been clear that while it will 'look at' precedents set by customs and trade agreements between the EU and elsewhere, it will 'not seek to replicate another country's model and will pursue the best possible deal for the UK.' However, the Government has been crystal clear that it would rather accept no deal at all – and hence fall back on WTO rules – than accept a bad deal. Should that occur, the Prime Minister has declared that the Government would engage in intense regulatory competition by creating a low-tax, light-touch regulatory regime.

Finally, the white paper reiterates that the Government intends to make an Article 50 TEU notification by the end of March 2017 at the latest, ensuring that the UK will no longer be an EU Member State by April 2019 unless there is a unanimous Council decision to extend the negotiations.

Stark contrast between White Papers

The contrast between the Welsh and Scottish Governments' and UK Government's approaches and white papers is stark. The UK Government has sought to sketch out the UK's future relationship with the European Union from scratch, while the devolved governments have sought to incrementally amend the *status quo*. This perhaps explains how the UK Government reaches a remarkably different outcome from the Welsh Government, in particular, which has a similar Brexit mandate.

EU suggests options for its future

Outside of the UK, Brexit has prompted the drafting of another white paper. The Commission's response to the existential question posed by Brexit is to push for a 'multispeed Europe.' The Commission published on 1 March 'On the future of Europe: Reflections and scenarios for the EU27 by 2025', presenting five scenarios as to how the EU may evolve in preparation for the rEU's Rome Summit in honour of the 60th anniversary of the Treaty of Rome. The five options are 'neither mutually exclusive, nor exhaustive' and illustrate that the Commission remains true to its 'ever closer Union' purpose. The proposed options are (1) 'Carrying On - The EU27 focuses on delivering its positive reform agenda in the spirit of the Commission's New Start for Europe from 2014 and of the Bratislava Declaration;' (2) 'Nothing but the Single Market – The EU27 is gradually re-centred on the single market;' (3) 'Those Who Want More Do More – The EU27 proceeds as today but allows willing Member States to do more together in specific areas such as defence, internal security or social matters. One or several "coalitions of the willing" emerge.'; (4) 'Doing Less More Efficiently - The EU27 focuses on delivering more and faster in selected policy areas, while doing less where it is perceived not

to have an added value;’ (5) ‘Doing Much More Together – Member States decide to share more power, resources and decision-making across the board. Decisions are agreed faster at European level and rapidly enforced.’

Brief history of EFTA and its structure

At this point, it is appropriate to make a brief detour to provide the backdrop and thus to set out why EFTA was founded, how its relationship with the (then) European Economic Community led to the development of the European Economic Area, the circumstances leading to the formation of the Swiss-EU bilateral agreements and to touch on their content.

A precondition for EEA membership on the EFTA side of the Agreement, is, as both the Welsh and Scottish Governments white papers acknowledge, membership of the European Free Trade Association. Were the UK to re-join, EFTA would become the world’s fourth largest trade bloc. EFTA membership would essentially enable the UK to profit from an existing global FTA network currently covering 38 countries. Moreover, the flexible nature of EFTA ensures that should not all EFTA States wish to, or be able to, conclude a joint FTA with a non-EEA country, then one EFTA country may conclude it on its own. For example, in 2009 Japan and Switzerland signed an Economic Partnership Agreement, and in 2013 both Iceland and Switzerland signed FTAs with China.

The current members of EFTA are Iceland, Liechtenstein, Norway and Switzerland, although, when founded upon the UK’s initiative in November 1959 as a direct response to the signature of the Treaty of Rome, the members were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. EFTA was intended to prevent economic discrimination from the newly-created EEC and to create free trade between those countries in

parallel to that within the EEC, with a view to being able to conclude an agreement with the six EEC countries in the future. Finland was, for a certain time, an ‘associate member’ of EFTA – a policy decision taken in order to ensure Finland’s strict neutrality between the West and the Soviet Union.

In 1973, following the accession of the United Kingdom, Ireland, and Denmark to the EEC, a series of bilateral FTAs were created between the then EEC and the EFTA countries. These worked relatively well. Nevertheless, in 1984, at a meeting between the EFTA countries and the EC Member States and the European Commission in Luxembourg, a programme for the future development of European economic cooperation was laid down. This ‘Luxembourg Declaration’ formed the basis of discussions to create a ‘European Economic Space’. This was intended to advance in parallel with developments within the EC, so as to prevent new barriers to trade being created through the EC’s efforts to complete its internal market. On 17 January 1989, the then President of the Commission, Jacques Delors, proposed ‘a new, more structured partnership with common decision-making and administrative institutions’ with the EFTA States. The Commission rowed back on this offer, as Austria, Norway, Sweden and Finland indicated that they saw the forthcoming EEA Agreement as a stepping stone to EU membership. Nevertheless, the Delors Declaration was the starting-point of the negotiations leading to the signature of the EEA Agreement. The formal negotiations between the seven EFTA States and the twelve EC Member States on the creation of the European Economic Area began on 20 June 1990 and were intended to be complete by the symbolic date of the completion of the Internal Market: 31 December 1992.

While the negotiations of the EEA Agreement were concluded on 22 October 1991, the

UK QUO VADIS? THE EEA AS A WORKABLE FRAMEWORK

Commission had asked the ECJ for its opinion on the compatibility with the EEC Treaty of the judicial mechanism planned in the EEA Agreement (the creation of an 'EEA Court'). Sven Norberg, formerly Director of the EFTA Legal Service and a Judge of the EFTA Court, has noted that there are reasons to assume that Opinion 1/91 was reasoned on the basis of an incomplete, provisional, French translation of the Agreement, although the Agreement had been negotiated in English. The ECJ delivered a very severe opinion, which has been justly criticised. It considered that an 'EEA Court' would have interfered with the autonomy of EU law, despite the fact that the 'EEA Court' would have been functionally integrated with the ECJ and, when sitting in plenary session, would have been composed of 5 ECJ Judges and 3 Judges nominated by the EFTA States.

The consequence of Opinion 1/91 was that the negotiators needed to create a new supervisory and judicial structure for the EFTA States. The ECJ held these were compatible with the EEC Treaty in Opinion 1/92. The finalised EEA Agreement was signed on 2 May 1992 alongside the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ('SCA'). It is the SCA which established the EFTA Surveillance Authority and the EFTA Court.

The EEA Agreement entered into force on 1 January 1994 and was described by the first President of the EFTA Surveillance Authority, Knut Almestad, as being 'tilted in favour of the EFTA States.'

The Swiss situation

Subsequently, Liechtenstein acceded to the Agreement; Switzerland, however, did not ratify it following a negative referendum, and its relationship with the EC was left in the cold. Thus, while the EEA/EFTA States are part of the Single Market, Switzerland, although an EFTA

State, has only partial access to the Single Market. The Swiss had feared that the EEA Agreement would be treated as a stepping stone to becoming an EC Member State and had significant concerns regarding the free movement of persons. Following its negative referendum, Switzerland embarked on bilateral negotiations with the EC. It sought to imitate, as far as possible, the conditions of the single market through a series of bilateral treaties. The first package of these agreements was signed on 21 June 1999. The Commission had stated in 1993 that bilateral negotiations with Switzerland should first be opened in the areas of air and road transport and of free movement of persons, areas in which Switzerland had not indicated that it wished to conclude bilateral agreements. Swiss requests, the Commission stated, should 'be considered on a strict basis of mutual advantage and without undermining the EEA [...] Any agreement would need to deal satisfactorily with the implementation of the Community acquis and the need for Switzerland to accept the discipline involved.'

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

On 26 October 2004, a further set of nine bilateral sectoral agreements between Switzerland and the EU was signed (the 'Second

Package’), and entered into force between 2005 and 2009. These treaties go beyond the granting of pure market access and include agreements on the taxation of savings income and on the accession of Switzerland to the Schengen and Dublin systems concerning cooperation in the areas of justice, police, asylum and migration. Certain mechanisms for the adoption of EU law and for decision shaping, inspired by the EEA Agreement, were introduced. These agreements are not as static as the First Package, and there is no guillotine clause.

No new agreement has been concluded between the EU and Switzerland since 2008, much to Swiss dismay. The European Council Conclusions regarding the EFTA States, Iceland, Liechtenstein, Norway and Switzerland of 2008, 2010, 2012, 2014, and 2016 made clear to Switzerland that new market access agreements will only be reached on the basis that a surveillance and court mechanism is included. The latest Conclusions, published on 28 February 2017, state in this regard: *‘The Council takes note of the reconfirmation by Switzerland of its attachment to the sectoral approach. However, the Council recalls that a precondition for further developing the sectoral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU’s Single Market, in order to ensure homogeneity and legal certainty for citizens and businesses. The Council stresses the common understanding between the EU and Switzerland about the need to finalise the negotiations on the institutional framework agreement as soon as possible. Its conclusion will allow the EU-Swiss comprehensive partnership to develop to its full potential.’*

The EU will be bound to apply these Council Conclusions to the UK’s intended hoped-for partnership agreement. The last 18 months have illustrated how the EU has been loath to grant

any sort of concession to Switzerland for fear of setting a precedent for the UK. Concerning the free movement of persons, Switzerland had proposed to impose quotas on migration following a referendum in February 2014 to end “mass immigration”. As a result of Brussels’ intransigence to Swiss overtures to limit the free movement of persons agreement by way of quotas, and fearful of the repercussions should the First Package’s guillotine clause be invoked, the Swiss Government changed tack. The Swiss Parliament has now ‘implemented’ the referendum result, as it was legally obliged to do, by requiring employers in sectors or regions with above-average unemployment to advertise vacancies at job centres and give local residents priority before recruiting from outside the country.

Docking—making use of the EFTA/EEA system

It should be noted that the EU proposed to Switzerland that it either join the EEA on the EFTA side or ‘dock,’ to use the parlance, to the EFTA pillar’s institutions (ESA and the EFTA Court). In either situation, Switzerland would have had the right to nominate its own ESA College Member (analogous to a European Commissioner) and EFTA Court Judge. The Swiss College Member and the Swiss EFTA Court Judge would sit in cases concerning the Swiss-EU bilateral agreements.

This ‘docking’ solution, while innovative, also demonstrates the regard with which ESA and the EFTA Court are held by the EU as, in such a circumstance, the EU would be the side without a ‘Commissioner’ or judge. Remarkably, the EFTA Court would be a ‘foreign court’ for the EU. However, the Swiss Government rejected the ‘docking’ solution, and made a counterproposal: it would accept the jurisdiction of the ECJ, but it contended that although the ECJ would give binding judgments vis-à-vis the Swiss-EU bilaterals, the final resolution of the case would be through bilateral diplomacy. Unsurprisingly,

UK QUO VADIS? THE EEA AS A WORKABLE FRAMEWORK

after 17 rounds of negotiations on this notion, no progress has been made.

The EEA Agreement, by contrast, is the most advanced trading agreement made with the European Union. The purpose of the EEA is '[...] so that the internal market is extended to the EFTA States' [...] for the benefit of businesses, workers and consumers.' It is an international treaty *sui generis* which contains a distinct legal order of its own. The EEA Agreement ensures that the same Single Market law is interpreted consistently across the EEA. In EEA law, this is termed 'homogeneity.' While the depth of integration of the EEA Agreement is less far-reaching than under the EU Treaties, its scope and objective go beyond what is usual for an agreement under public international law. The EEA/EFTA States have not 'pooled' their sovereignty as EU Member States have. There is no 'ever closer Union,' nor is the EEA a customs union. Remarkably, the EEA Agreement seeks to achieve a homogeneous European Economic Area, based on common rules 'without requiring any Contracting Party to transfer legislative powers to any institution of the EEA [. . .].' For EU law practitioners, the EEA Agreement is both extremely familiar yet distinct: it is the same, but fundamentally different. For example, the EU law principles of direct effect and primacy were not made a part of the EEA Agreement. Instead the drafters sought other solutions, which produce results similar to those under EU law. Consequently, State liability in the EFTA pillar is arguably stricter than its EU law equivalent.

The strength of the EEA is its two-pillar structure and its institutions: the Agreement is held aloft co-dependently by its EU-side (the EU Member States, the EU institutions, etc.) and EFTA-side (the EEA/EFTA States and their EFTA institutions (ESA and the EFTA Court)). ESA fulfils the same monitoring function as the Commission over EU Member States, but that is the extent of its mandate. The EFTA Court operates as a single

instance apex court for challenges brought against ESA decisions and references for advisory opinions. Advisory opinions are almost identical to preliminary rulings of the ECJ. However, they leave the national courts more leeway. The EFTA Court's working language is English and it does not have Advocates-General. Thus, while modelled on the ECJ, the EFTA Court's jurisprudence demonstrates that it vigorously upholds the principles of homogeneity and reciprocity, while maintaining the essential EFTA values of liberal free trade.

The most important joint EU-EFTA body is the EEA Joint Committee ('EEA JC'). The EEA JC is responsible for the management of the EEA Agreement. It is a forum in which views are exchanged and decisions are taken by consensus to incorporate, or not, secondary EU legislation into the EEA Agreement. The EEA JC is comprised of the ambassadors of the EEA/EFTA States and representatives of the EU's European External Action Service. Within the EEA JC, the EEA/EFTA States 'speak with one voice.' As noted above, the scope of the EEA Agreement is not the same as the EU Treaties. The EEA Agreement covers only Single Market matters; agriculture, fisheries and customs provisions are intentionally excluded. Matters of 'political integration' which go beyond the core of the internal market (e.g. Monetary Union (EMU) or the Common Foreign and Security Policy) are also excluded. Further areas which are not included are procedure and EU rules governing the allocation of jurisdiction and recognition and enforcement and judgments.

That is not to say that EEA/EFTA States are prevented from being party to what one might imagine to be purely EU arrangements. For instance, each EEA/EFTA State (but also Switzerland) has chosen to be associated to the Schengen Agreement. Likewise, the three EEA/EFTA States have chosen to be Erasmus+ 'programme countries' in exactly the same way

UK QUO VADIS? THE EEA AS A WORKABLE FRAMEWORK

as EU Member States, allowing their students to study at a university in another European country. Norway and Iceland, for instance, also take part in the 'Horizon 2020,' the EU's research and innovation programme. Norway has approximately 100 bilateral agreements with the European Union: these include an agreement on mutual legal assistance (exchange of information between law-enforcement and prosecution services); and a surrender agreement based on the principles of the European Arrest Warrant (yet to enter into force).

Finally, the idea floated by the Bruegel think tank's paper of 1 September 2016 on a 'Continental Partnership Agreement' should be mentioned as well. The proposal is based on the design of the EEA, being formed of EU and Continental Partnership countries, but has a number of differences. It is founded on the basis of an intergovernmental structure, based on the Single Market. Continental Partnership countries would not participate in the freedom of movement of workers, would not share the political commitment to ever closer union, and would have less political influence over decisions of common interest, but would have structured, institutionalised cooperation in the fields of security policy and foreign affairs.

The EEA as a workable framework for the UK

Returning to the domestic white papers, how do they compare against the existing relationship models with the European Union? Prior to the white papers, four possibilities that had been floated in terms of 'Soft Brexit': the EEA; the Swiss model (i.e. a sectoral approach) with an additional element of 'docking'; the Continental Partnership Agreement proposal made by the Brussels-based think tank Bruegel; and a new multilateral trade framework. Of course, if soft Brexit is not possible, or desired, there will be hard Brexit. This will involve either falling back onto the WTO rules, or alternatively a bespoke

FTA (Canada-style model - CETA) without institutions.

It is clear that the Welsh and Scottish Governments are strongly in favour of the EEA options, with certain modifications (as regards agricultural and fisheries products (Welsh Government); or possibly as a solution for Scotland itself (Scottish Government)), and both devolved governments wish the UK to remain party to the EU's customs union.

The UK Government's white paper is more difficult to compare against this backdrop and only partially because the white paper is vague. It is also extremely complicated. The UK Government's white paper would appear to be a sectoral bilateral relationship *à la Suisse* (which was the interpretation made by the German Finance Minister Wolfgang Schäuble of the Lancaster House speech), but other elements appear more comprehensive and deeply integrating. The White Paper makes clear that the UK will be outside of the Single Market, and it must be considered as somewhere between the Swiss sectoral approach and the Continental Partnership concept. Indeed, the extent of the relationship is clearly beyond that established by CETA, between the EU and Canada. While a bespoke FTA agreement may be an attractive option from a UK perspective, it is most unlikely to be concluded within the two-period following from an Article 50 TEU notification. Even so, the notion that agreement will be *reached* within two years is unlikely. It is plausible that the Commission will insist on negotiating an 'exit' agreement prior to any trade negotiations, including the scope of the UK's ongoing liabilities – whether as regards EU civil servant pensions or the disposal costs of European Space Agency spacecraft. Moreover, it must be borne in mind that CETA took 7 years to negotiate; the UK Government's white paper would be a mixed agreement. As is now well known, this requires each Member State to sign: e.g. Belgium requires its regional parliaments and

UK QUO VADIS? THE EEA AS A WORKABLE FRAMEWORK

linguistic communities to acquiesce. The forthcoming Opinion 2/15 from the Court of Justice of the European Union ('ECJ') on the EU-Singapore Free Trade Agreement (which itself was used as a template for CETA) *may* resolve the 'mixity' question. In her opinion, Advocate General Sharpston considered that CETA is a mixed agreement. Nevertheless, if an agreement between the UK and EU is not reached within the two-year period, it is certainly questionable whether the WTO *automatically* provides a fall-back position for the UK on the same terms as at present. Moreover, the seemingly deliberate choice to prefer diplomatic committees and arbitration as mechanisms for dispute resolution (as set out in Annex A to the White Paper) make the intended relationship rather amorphous, as it lacks the structures which would allow the agreement to function in practice (in the remote circumstances the rEU would accept such mechanisms).

The Prime Minister's self-imposed deadline of the end of March 2017 to make an Article 50 TEU notification is fast approaching. The UK Government's white paper, unlike those of the devolved administrations, should not be considered as the last word on the Government's position because of the necessary haste with which it was prepared. Rather it should be understood as a work in progress. That being said, the rather curious positions expressed in the white paper, particularly as regards the suggested proposals for a dispute resolution mechanism, may rapidly become intransigent policy positions. Brexit creates, as a matter of EU law, a new category of country – a former EU Member State – and the impending negotiations will form a precedent. Professor Kalypso Nicolaïdis has cogently argued that the rEU must treat a former Member State in a manner superior to all other non-EU States, including EEA/EFTA States. This should engender goodwill – not least because it is the rEU's own national self-interests should they ever seek to

leave the EU – and because the exiting Member State is fully compliant with the *acquis*.

While impending elections in the Netherlands, France, Germany, and potentially Italy, as well as a second Scottish independence referendum, could transform the nature of negotiations altogether, the rEU's strongest card in the negotiations is the two-year window set by Article 50 TEU. The unanimity requirement means that it is very unlikely that the two-year window will be extended, unless a draft agreement is ready but has been referred to the ECJ. Six months spent shadow-boxing is not in the UK's interest. Optimistically, it will take two months before the rEU will be in a position to negotiate. It has indicated that it will first convene a summit at which to agree the EU's negotiating guidelines; the Commission will then finalise those guidelines and promulgate a negotiation directive or directives, which would then need to be approved by Council.

The UK is most unlikely to achieve a perfectly bespoke agreement with the rEU. Rather, it is likely to be 'made to measure': based on an existing model relationship with the EU, but altered to take account of the preferences and particularities of both parties. There are two initial questions: should the relationship be bilateral or (potentially) multilateral; and should the agreement be comprehensive or sectoral?

The UK Government seems to prefer a bilateral, comprehensive, agreement (presumably based on CETA, or rather less likely (and indeed from a UK perspective, unwisely) on the Deep and Comprehensive Free Trade Area (DCFTA), part of the Association Agreement between the EU and Ukraine). Depending on the view of the ECJ on 'mixity' in Opinion 2/15, the 'made to measure' (rather than bespoke) FTA concept may be more or less difficult on the legal and political planes to achieve. It would, in any case, take more than two years to negotiate and ratify, which would entail a gap between being an EU Member State

and having the bespoke FTA, unless a transitional arrangement is reached.

However, the Prime Minister's Lancaster House speech could well be understood as seeking a bilateral, sectoral relationship. Such a relationship would be achievable, but would necessarily require a non-national supervisory system and judicial forum given the Swiss experience. 'Docking' these sectoral agreements to the EFTA institutions, with the UK having its own College Member and Judge taking part in UK cases, would be in line with the EU Council's conclusions as regards Switzerland.

Annex A to the UK Government's white paper indicates that the Government may prefer that any disputes be adjudicated through arbitration rather than before a court. Whether arbitration would be acceptable to the EU is more than doubtful; Article 111(4) EEA states that no question of interpretation of provisions of EEA law that are identical in substance to provisions of EU law may be dealt with in arbitration procedures. Even were the EU would agree, arbitration on such a scale would be extremely expensive. The experience of the EEA/EFTA States has been that it is of great advantage to have an 'own court.' A court provides a gateway to justice for companies and individuals that State-to-State arbitration cannot, as a party who considers that its rights have been infringed requires political support in order to bring its case. CETA additionally includes investor-State arbitration.

It is plausible that, in a sectoral-based arrangement, the EU would insist on having free movement of persons as one of the first agreements *sine qua non*, as it did with Switzerland. This is likely to be politically unpalatable to the UK, and could lead to deadlock and no agreement being reached within the 2-year time frame. The current Danish negotiations to obtain partial access to Europol through a parallel agreement following the

negative referendum result of 3 December 2015 (against adopting the opt-in arrangement on 22 legislative acts related to cross-border crime) may prove illustrative.

A new multilateral solution for the UK and others

A multilateral agreement, or a bilateral agreement that would be open to other countries to accede, would potentially provide the UK with a better overall deal. The simplest arrangement would be to accede to EFTA and become an EEA/EFTA State, ensuring that the UK would remain part of the Single Market. This is the preferred option of the Welsh and Scottish Governments. The EEA provides a workable framework for the UK. There is no 'ever closer Union'. There would be no judicial oversight by the ECJ once s.3 European Communities Act 1972 is repealed. The UK could join the existing FTAs EFTA States have signed and would have the freedom to make its own FTAs and set its own trade policy, as the EEA is not a customs union. That being said, there are aspects to the EEA Agreement, as is, which could be modified in order to further improve this robust, durable and pragmatic instrument. A revised 'European Partnership Agreement' is achievable and would likely be attractive to the EEA/EFTA States and Switzerland. Moreover, in providing a comprehensive solution to the EU-Swiss relationship, this would provide the UK with considerable goodwill in Brussels.

Firstly, should the UK determine that it should remain in the EU's customs union, to whatever degree, then this agreement could be placed alongside the EEA Agreement.

Secondly, the EEA Agreement, as it currently stands, contains the free movement of persons which applies, to a similar extent, as in the EU, although the concept of 'Union Citizenship' has no equivalence for EFTA nationals. The Bruegel think tank's 'Continental Partnership' paper broke the taboo, discussing whether the EU should

UK QUO VADIS? THE EEA AS A WORKABLE FRAMEWORK

make a concession to the UK on this point. The Bruegel authors contend that, unlike freedoms of goods, services and capital, free movement of persons is not economically but politically determined. It is worthy of note that one of the five authors is Norbert Röttgen, a former German Federal Minister and now Chairman of the Bundestag's Committee on Foreign Affairs.

Thirdly, the current EEA/EFTA States do not have a co-decision right in the creation of new Single Market legislation. They do not have a vote. Rather they have a co-determination right, which means that they have a right for their national technical experts to be involved in the creation of the rules. It is arguable that the current EEA/EFTA States have underutilised the potential available through co-determination. Nevertheless, it is undeniable that this is unattractive from a UK perspective. Would the UK be able to negotiate the creation of such a co-decision right? It is plausible and would certainly be in the interests of the current EEA/EFTA States, as well as Switzerland. This would certainly be in line with Jacques Delors' offer in 1989 of 'a new, more structured partnership with common decision-making and administrative institutions.' The Bruegel authors were thinking along similar lines when they proposed 'The EU States and the Non-EU States could enter into a Continental Partnership Agreement, CPA. The discussion of single market legislation in a new CP Council, which would consist of EU institutions and Non-EU CP States, would take place and the CP States would have a right to propose amendments.' This proposal is a 'back to the future' development of the EEA as the EU would enact its law in its normal legislative procedure, but a political commitment would be made by the EU States to take into account the other countries' considerations in the 'CP Council.'

Fourthly, the UK would need to make cohesion payments to support less-developed regions, as

well as for their relative costs of administration in shared programmes e.g. Horizon 2020. Cohesion payments, as a form of targeted development aid, are designed to increase the living standards of the recipient region, through improved infrastructure. These economic improvements make the recipient region better able to purchase goods and services from the provider. The EEA/EFTA States make such payments to be members of the Single Market. Nevertheless, these cohesion payments are made through their own organisation and on their own projects. The UK would not need to make equivalent 'Norway grants', which Norway makes voluntarily. Were the UK to join the EFTA pillar of the EEA, its total contributions would be approximately half of what is paid at present. It is further worthy of note that Switzerland also makes contributions for its limited access to the Single Market. The Bruegel paper also contends that if the UK were to remain in the single market, it would have to make payments into the EU budget.

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

An important aspect that is sometimes overlooked is on the rules governing the allocation of jurisdiction and recognition and enforcement of judgments (i.e. the Brussels I regime). This is not provided for in the EEA Agreement. Instead, the UK could accede to the Lugano II Convention which applies between the

UK QUO VADIS? THE EEA AS A WORKABLE FRAMEWORK

EU, Switzerland, Norway and Iceland. Lugano II is specifically open for accession by new EFTA States. It corresponds to the former Brussels I Regulation, but could be revised to bring it into line with Brussels I *bis* and *inter alia* remove the effect of the ECJ's judgment in Case C-116/02 *Gasser*.

The strength of the EEA Agreement lies in its robust institutions, most recently demonstrated in Case E-21/16 *Pascal Nobile*. The Order of the President of 20 February 2017 in that case made explicit that 'the Court assumes an essential role in the EEA legal order and the proper composition of the Court is key to the observance of the rights and obligations flowing from the EEA Agreement. Without an independent court, the purpose of the Agreement would be rendered nugatory and the EFTA States would fail to safeguard the protection of the rights of individuals and economic operators. To maintain the independence of the judiciary is not a privilege for judges, but a guarantee for the respect of these rights and a bulwark of the democratic order.'

A UK-EU trade agreement will require a supervisory body and a court, but bilateral institutions will not be entertained by the EU: a former Member State, however important, will not be deemed equivalent to 27 remaining Member States. The EFTA Court is mature and independent. The purpose of EFTA and the EEA is to further the friendly relations and trade between sovereign member countries. The EFTA Court has characterised its relationship with national supreme courts as being 'more partner like': this is a natural consequence of both the legal framework of the EEA and SCA, but also of the Court's ethos. This ethos is borne out in the Court's jurisprudence: assessing the economics in cases for example, in E-15/10 *Norway Post*; applying the economic concept of moral hazard in E-16/11 *Icesave*; to expecting consumers to be

able to download or print out a document from the website of a financial services provider in the Internet age in Case E-4/09 *Inconsult*; and applying a flexible interpretation of the Working Time Directive in Case E-5/15 *Matja Kumba*. Whether the UK-rEU trade agreement is 'docked' to ESA and the EFTA Court, or with a permanent British Judge on the EFTA bench, the UK's political and economic interests would be protected and would fulfil the Brexit referendum mandates from all parts of the UK.

Conclusion

In conclusion, the EEA Agreement has proved itself to be a robust, durable and pragmatic instrument of extending the Single Market for more than 20 years. It has no federalist ambition and leaves sovereignty in national hands, and has demonstrated that the two pillar structure works well in Europe. An updated version could be a natural home for the UK post Brexit. Revisions to the EEA are both possible and achievable and would be in the interests of the EU, the current EEA/EFTA States and potentially Switzerland. A European Partnership Agreement would enable the Prime Minister to achieve a 'mature, cooperative relationship' with the remainder of the EU in these increasingly uncertain times.

- This report was edited by Joe Tomlinson (Lecturer in Public Law at the University of Sheffield) and Kristi Boyes (LLB student at the University of Sheffield).
- At the seminar, Dr Richard Kirkham (Senior Lecturer in Public Law, University of Sheffield) and Professor Tamara Hervey (Jean Monnet Professor of European Union Law, University of Sheffield) acted as discussants.
- Professor Robert Burrell (Professor of Law and Head of School, University of Sheffield) acted as Chair.

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