

## The UK and the EEA after Brexit

The European Free Trade Association (“EFTA”) is an intergovernmental organisation set up to promote free trade and economic integration to the benefit of its members.

Membership of the EFTA Pillar of the EEA may arguably provide an appropriate post-Brexit alternative to membership of the EU for the UK. The EFTA Pillar of the EEA currently consists of Iceland, Liechtenstein and Norway. We would, however, conclude from an examination of both the provisions and the procedures that govern the EEA that were the UK to successfully navigate the procedure leading to membership of the EFTA Pillar of the EEA the UK is likely to find itself in a position similar to, or potentially even less advantageous, than that brought by membership of the EU.

Although EEA EFTA States participate only in decision-shaping, with no direct participation in decision-making, they are obliged to

implement EU legislation of EEA relevance into their national law. Moreover, although it is the EFTA Court, rather than the Court of Justice of the European Union, that rules in matters arising from the EEA Agreement relating to the EEA EFTA States, the Court is bound to respect the previous case law of the Court of Justice when coming to decisions in similar matters.

Finally, were the UK to become a member of EFTA it would have no obligation to become a member of the EFTA Pillar of the EEA. If, however, it chose to take this step, the UK’s admission into the EEA would be subject to the unanimous vote of the EEA EFTA States, the remaining EU Member States, and the EU.

## The European Free Trade Association

EFTA currently has four Member States; Iceland, Liechtenstein, Norway and Switzerland.

Article 2 of the EFTA Convention provides the scope of the Convention as follows:

- a) to promote a continued and balanced strengthening of trade and economic relations between the Member States with fair conditions of competition, and the respect of equivalent rules, within the area of the Association<sup>1</sup>;
- b) the free trade in goods<sup>2</sup>;
- c) to progressively liberalise the free movement of persons<sup>3</sup>;
- d) the progressive liberalisation of trade in services and of investment<sup>4</sup>;
- e) to provide fair conditions of competition affecting trade between the Member States<sup>5</sup>;
- f) to open the public procurement markets of the Member States<sup>6</sup>;

The EFTA States have concluded free trade agreements (“FTAs”) throughout the world establishing an extensive network of preferential free trade relations. In 2016, this network consists of twenty-six FTAs with thirty-seven partners. EFTA’s oldest free trade agreements that are still in force are those signed in the 1990s with Turkey, Israel, Morocco and the Palestinian Authority<sup>7</sup>. Negotiations are currently in progress with Georgia, India, Indonesia, Malaysia and Vietnam. Negotiations with Algeria, Russia, Belarus and Kazakhstan, Honduras and Thailand are on hold<sup>8</sup>.

## The European Economic Area Agreement

The increase in the use of non-tariff barriers to trade and the growth in trade in services in the 1970s strengthened the impression of the FTAs as important, but nevertheless insufficient. It was for this reason that EFTA began to develop close trade relations with what was then known as the EEC<sup>9</sup>. In 1992, the countries who were then Member States of EFTA (Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland) began negotiating an agreement with the EEC on the creation of the European Economic Area (“EEA”). While these negotiations were being finalised, the Swiss electorate rejected membership to the EEA in a referendum held in December 1992.

In March 1993, the remaining six EFTA Member States signed the European Economic Area Agreement (“the EEA Agreement”) with the EEC and the EEC Member States. In the following year, Austria, Finland, Norway and Sweden applied for full membership of the then European Communities (“EC”). Austria, Finland and Sweden joined the EC in 1995. In December 1994, the Norwegian electorate rejected membership of the EC in a referendum.

The EEA Agreement entered into force on 1 January 1994. It extended the Internal Market of the EC to three of the EFTA countries; Iceland, Liechtenstein and Norway (“the EEA EFTA States”). Switzerland did not accede to the EEA. The country did, however, conclude several Bilateral Agreements with the EU in 1999. These entered into force on 1 June 2002.

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1 See Articles 14 and 15 of the EFTA Convention.

2 See Articles 3 to 13 of the EFTA Convention.

3 See Articles 20 to 22 of the EFTA Convention.

4 See Articles 23 to 36 of the EFTA Convention.

5 See Articles 16, 17, 18 of the EFTA Convention.

6 See Articles 16, 17, 18 of the EFTA Convention.

7 “EFTA at a Glance”, September 2016, publication by EFTA, consulted at EFTA website: <http://www.efta.int/sites/default/files/publications/fact-sheets/General-EFTA-fact-sheets/efata-at-a-glance-september-2016.pdf>

8 Ibidem.

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9 For more information concerning this paragraph, see “The European Economic Area Factsheet”, EFTA Factsheets, October 2014, consulted at: <http://www.efta.int/media/publications/fact-sheets/EEA-factsheets/EFTAfactsheetEuropeanEconomicAreaEEA.pdf>

## Relationship between the EEA EU Pillar and EEA EFTA Pillar

As a result of the EEA Agreement, EU legislation governing what are commonly known as the four fundamental freedoms (the free movement of goods, services, capital and persons) is extended to the EEA EFTA States, which are commonly referred to collectively as the EFTA Pillar. The EEA EFTA States have the duty and in some instances the constitutional requirement to implement legislation of “EEA relevance” into their national law. This means that, in areas of EEA relevance, rights and obligations which are imposed on EU Member States, or their public entities, undertakings or individuals in relation to each other are also imposed on the EEA EFTA States.

Article 1 of the EEA Agreement provides that the aim of the EEA is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area. The EEA Agreement covers:

- a) the free movement of goods;
- b) the free movement of persons;
- c) the free movement of services;
- d) the free movement of capital;
- e) the setting up of a system ensuring that competition is not distorted and that the rules thereon are equally respected; as well as
- f) closer cooperation in other fields, such as research and development, the environment, education and social policy.”

The EEA Agreement guarantees equal rights and obligations within the Internal Market to citizens and economic operators established in the EEA<sup>10</sup>. The Internal Market is a single market in which the free movement of goods, services, capital and persons is assured, and in which citizens are free to live, work, study and do business. Moreover, Article 118 of the EEA Agreement provides that the Agreement may be extended to any policies considered likely

to contribute to attainment of the objectives of the EEA Agreement or otherwise deemed by the contracting parties to be of mutual interest.

The EEA Agreement does not, however, apply to the following policies<sup>11</sup>:

- Common Agriculture and Fisheries Policies;
- Customs Union;
- Common Trade Policy;
- Common Foreign and Security Policy;
- Justice and Home Affairs (the EFTA States are, however, part of the Schengen area);
- Economic and Monetary Union (EMU).

## EEA Decision-Shaping

The EEA EFTA States do not have a role in the decision-making phase of EU legislation. They do, however, have the role of decision-shaping. Input can take the form of participation by EEA EFTA experts in EU committees, the submission from the EFTA Pillar of comments on draft provisions, or the adoption of resolutions in response to legislative initiatives by the European Commission.

The importance of participation by the EFTA Pillar in expert groups has decreased over the last 20 years. This is largely due to institutional changes in the EU Pillar such as introduction of co-decision between the Council and the European Parliament, from which EEA EFTA States are excluded<sup>12</sup>.

## The CJEU and the EFTA Court

The EFTA Court reflects the role of the Court of Justice of the European Union in matters relating to the EEA EFTA States. The EFTA Court adjudicates infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application, or interpretation of EEA rules and hears appeals against decisions taken by the EFTA Surveillance Authority. The Court also rules on disputes between the EEA EFTA

<sup>11</sup> See “The European Economic Area Factsheet”, EFTA Factsheets, October 2014, p.1 consulted at: <http://www.efta.int/media/publications/fact-sheets/EEA-factsheets/EFTA Factsheet European Economic Area EEA.pdf>

<sup>12</sup> See “The European Economic Area Factsheet”, EFTA Factsheets, October 2014, p.2 consulted at: <http://www.efta.int/media/publications/fact-sheets/EEA-factsheets/EFTA Factsheet European Economic Area EEA.pdf>

<sup>10</sup> See Article 124 of the EEA Agreement.

States and gives advisory opinions to national courts of the EEA EFTA States concerning the interpretation of EEA rules.

Article 6 of the EEA Agreement provides that, where the provisions of the EEA Agreement are identical in substance to the provisions of EU law the rulings of European Court of Justice (“CJEU”) delivered before the signature of the EEA Agreement constitute a source of EEA law. Consequently, the EEA Agreement must be read in conjunction with the EU Treaties to determine whether a provision is specific to the EEA Agreement or whether it is identical in substance to a provision of the EU Treaties. The EFTA Court is, as a result, bound to follow the prior case law of the CJEU in areas over which the CJEU has jurisdiction.

### Accession to the EFTA Pillar of the EEA

Article 128 of the EEA Agreement provides that any country in Europe becoming a member of EFTA may apply to become a Party to the Agreement by addressing its application to the EEA Council. The terms and conditions for such participation are the subject of an agreement between the EEA EFTA states, the EU and the EU Member States on one side and the applicant state on the other side. That agreement must be submitted for ratification or approval by all the EU Member States and the EEA EFTA States as well as by the EU, in accordance with their own procedures. As a result, European countries may become member states of the EEA Agreement only if they are already a member of EFTA. Any State may accede to the EFTA Convention provided the EFTA Council, composed of the heads of the permanent delegations to EFTA, unanimously approves its accession.

### The EEA Agreement as an EFTA free trade agreement?

The EFTA Convention provides that European States acceding to the EFTA Convention must also apply to become a party to the free trade agreements that have been concluded between the EFTA Member States on the one hand and third states, unions of states or international organisations on the other.

The scope of Article 56(3) of the EFTA Convention is currently the subject of some debate. The provision states that:

“Any State acceding to this Convention shall apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other.”

Read literally, this provision requires that a country acceding to the EFTA Convention should also become a member of the free trade agreements that EFTA States have concluded with third states, such as FTAs, or with unions of states. Agreements with “unions of states” could be interpreted as including the EEA Agreement concluded with the EU.

This interpretation is, however, arguably inconsistent with the wording of the accession provisions in Article 128(1) of the EEA Agreement:

“

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.

”

Article 128(1) appears to make membership of the EEA Agreement by EFTA States a choice rather than an obligation. It provides that new EFTA States may apply to become a party to the EEA Agreement. Unlike new EFTA States, new EU Member States shall apply for membership of the EEA.

The centre of the related debate lies in the question of whether or not the EEA Agreement may qualify as a free trade agreement concluded by the EFTA States with unions of States.

Historically, the relationship between the EFTA States and the-then European Communities began with the negotiation of free trade agreements<sup>13</sup>. The conclusion of the EEA

<sup>13</sup> See “The European Economic Area Factsheet”, EFTA Factsheets, October 2014, p.1 consulted at: <http://www.efta.int/media/publications/fact-sheets/EEA-factsheets/EFTAfactsheetEuropeanEconomicAreaEEA.pdf>

Agreement replaced the free trade agreements between the parties by the provisions of the EEA Agreement. The intention of the EEA Agreement is to extend the EU Internal market to the EEA EFTA and to liberalise trade in the European Economic Area. In such circumstances, the EEA Agreement could qualify as a free trade agreement of sorts.

The scope of the EEA Agreement differs, however, from that of FTAs concluded by EFTA States with third countries. FTAs typically cover trade in goods, including trade in fish and other marine products, protection of intellectual property rights, trade in services, competition and government procurement. The EEA Agreement, however, seeks to achieve closer cooperation, a single market for all forms of trade, including free movement of persons that includes horizontal and flanking policies such as competition and the participation by the EFTA States in EU programmes.

Irrespective of how it is classified, application by EFTA States to become members of the EEA Agreement is governed by the accession clause provided at Article 128 of the EEA Agreement. A new EFTA State would be obliged to conclude an agreement that was accepted by the existing EEA EFTA States, the EU and all EU Member. Unlike membership of existing FTAs concluded by the EFTA states with third countries which is automatic for new EFTA states by virtue of accession to the EFTA Convention, membership of the EEA Agreement would require the unanimous agreement of all EEA countries and of the EU.

### Does Brexit mean that the UK will no longer be a member state of the EEA?

The EEA Agreement was concluded by the EU and the EU Member States as a “mixed agreement”. Mixed agreements include elements that are within the exclusive competence of the EU and elements which are within the exclusive competence of the EU Member States. The EU and the EU Member States are jointly competent to negotiate and conclude such agreements.

Implementation of mixed agreements has two aspects in the EU:

- the 28 EU Member States must each ratify the agreement according to their own constitutional ratification procedures; and
- at an EU level, international treaties concluded by the Council of Ministers, including mixed agreements, become part of EU law without any need for further measures of transposition or incorporation into EU law.

Although there are no specific related provisions, if the UK stops being an EU Member State, the country would appear likely to be required to withdraw from the EU Pillar of the EEA Agreement. Article 216(2) TFEU provides that:

“

Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

”

From the moment an individual country ceases to be an EU Member State, it is no longer bound by international agreements that have been concluded by the EU, including the EEA Agreement.

However, as a mixed agreement, the effects of withdrawal from the EU of the UK are not straight-forward. Essentially, the UK would no longer be bound by the elements of the EEA Agreement that fall within the exclusive competence of the EU. The country would, at least theoretically, remain bound by those elements of the EEA Agreement that fall within the competence of the EU Member States and outside EU competence.

The difficulty is that it would appear to be virtually impossible to determine which elements of the EEA Agreement fall within the exclusive competence of the EU Member States and which within the exclusive competence of the EU. This delimitation of competence would be difficult to operate since there is no clear catalogue or stipulation in the Agreement of which elements fall within the respective competence of the parties.

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