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Brexit and the Single Market Revisited

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with additional comments on the EU Internal Market vs the EEA, re-negotiated customs arrangements, transitions vs end states, legal interpretation, regulatory divergence/alignment, and ways forward.

George Yarrow[1]

1. Introduction

As the Brexit negotiations begin to focus on future trading and customs arrangements these notes reprise the principal theme of *Brexit and the Single Market*[2] (published in July 2016 in the wake of the referendum) and add comments on some aspects of the subsequent discourse.

Very briefly, my conclusion back then was that the most efficacious way to respond to the Leave vote on 23 June 2016 would be to seek a Brexit based on the UK's continued membership of the European Economic Area (EEA) in the period immediately following withdrawal from the Treaty of Lisbon. There were three main reasons for taking this view.

First, to a very good approximation the EEA Agreement (EEAA) is consistent with satisfying the chief aspirations of the Leave majority, most notably to 'take back control' (e.g. of borders, laws and money, as the matter is now frequently put). Continued membership of the EEA would mean that those aspirations could be met on Brexit day, currently set at 29 March 2019.

Second, the relevant Treaty rights conferred by the EEAA have considerable 'option value'. It would be an act of folly, whether intentionally or unwittingly, to surrender this value until such an act was warranted and necessary to secure something of greater or similar value. This points immediately to a twin-track policy strategy based on clear distinction between shorter-term and longer-term issues: secure satisfactory trading arrangements in the short term whilst continuing to seek out improved arrangements for the longer-term.

Third, and the starting point of the reasoning, retention of EEA membership is a matter of choice for the UK, i.e. a matter that Government and Parliament can largely control. In contrast, all other ways forward seem to imply an avoidable surrender of control/influence that would leave the UK more vulnerable to unwanted shocks and hazards. A decision to hold tight to an existing agreement, the EEAA, could therefore be seen as a first exercise in 'taking back control': it is something that could be done immediately, ahead of Brexit day.

Underpinning these points are three, major facets of the EEAA *as it applies to its non-EU members*:

- The Agreement respects the full national sovereignty of governments and parliaments.

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[2] www.rpieurope.org/Publications/Yarrow_Brexit_and_the_single_market.pdf

- The Agreement's Article 127 allows for rapid and easy exit from the EEA.
- The UK is already a party to the EEAA and that status enjoys protections under international law.

Put into a more analytic framework what these points add up to is that UK retention of EEA membership would serve as the obvious *proximate objective* for a Brexit strategy. A proximate objective is an identified goal that contributes to the successful overcoming of a more wide-ranging challenge, being (a) consistent with the guiding principles adopted (as a matter of strategic choice) in response to that challenge, but (b) close enough at hand to provide a high degree of confidence that it is achievable in a shorter timescale. It amounts to "taking a strong position and creating options" and tends to be particularly effective in decision-making contexts that are dynamic and uncertain.[3] It is a familiar element of good strategies in a wide range of contexts, for example in businesses, in warfare and in the game of chess. It works by aiding the development of a set of immediate, co-ordinated and coherent actions that are favourable for ultimate success.

Some of the sequencing aspects of the policy strategy indicated in *Brexit and the Single Market* have relatively recently come to be a feature of the UK Government's position, based as it now is on recourse to a transition or standstill period following Brexit. However, every step forward seems to have been accompanied by a step back. An example is the focus on a transition period *of pre-determined length*, which entails a surrender of later optionality and thereby brings avoidable risks and vulnerabilities back into play.

The nature of the agreements governing trading arrangements in a transition/standstill period have yet to be settled: the EEAA could yet be the cornerstone agreement, but it may not be. The decisions soon to be made are important because immediate post-Brexit arrangements have major implications for outcomes over a later, longer period. Re-visiting some of the fundamental issues at stake is therefore of more than historical interest.

2. The principal theme: an updated summary

The UK is currently a Contracting Party to the EEAA, which is a *multilateral* international Treaty. For example, it establishes rights and obligations governing relationships between Norway and Iceland, and also between each of those two (non-EU) countries and the UK: it is not a bilateral agreement between 'the EU on the one hand and a third country on the other hand' in the manner of the EU free trade agreements (FTAs) with Canada and South Korea.

The UK signed and ratified the Agreement in the early 1990s as one of the *original* Contracting Parties. The EEAA is what the EU calls a multilateral *mixed* agreement. For such agreements it is reasonably clear that, even under EU law (and before we get to international law) EU Member States are contracting parties "in their own right", not simply as adjuncts to the EU.[4]

[3] Richard Rumelt: *Good Strategy, Bad Strategy: The Difference and Why it Matters*, Profile Books, 2011, Chapter Seven.
[4] G. Van der Loo and R. Wessel, "The non-ratification of mixed agreements: Legal consequences and solutions", *Common Market Law Review*, 54, Issue 3, 2017.

There is no mandated linkage between *withdrawal* from the EEAA and *withdrawal* from the Treaty of Lisbon. Specifically, there is nothing in the text of either Treaty that states or unambiguously implies that withdrawal from one Treaty entails withdrawal from the other. The emphasis on withdrawal is important here. There have been arguments as to whether the UK would need to become a member of EFTA in order to *become* a member of the EEA (i.e. *accede* to the EEAA). However, the UK already *is* a party to the EEAA, so those arguments would only become relevant if it first withdrew from the EEAA. Withdrawal issues are therefore primary.

The Vienna Convention on the Law of Treaties (VCLT) sets out the appropriate ways in which a party can withdraw from a Treaty, *if it wishes to do so*. These are either (a) voluntary withdrawal via a specific provision in the relevant Treaty or (b) withdrawal with the unanimous consent of all the parties to the Treaty (see Article 54, VCLT).

It is also possible for other parties to end the participation of an existing party to a Treaty, if the party is in material breach of the agreement (Article 60, VCLT), but the procedures for doing are far from straightforward: international law tends to lean towards the sustenance of Treaties, not their dismemberment. In the case of the EEAA, expulsion of the UK would require the unanimous agreement of all the other parties, including Iceland, Liechtenstein and Norway as well as all EU Member States and the EU itself. In the event of an attempt to exclude a party against its wishes the VCLT points parties to international dispute resolution processes to resolve the disagreement. In a nutshell, forced expulsion of the UK from the EEAA is not something that could be easily achieved.

The UK therefore *currently* enjoys a considerable degree of control over the post-Brexit outcome stemming from its *current* Treaty rights. If it chooses to remain a party to the EEAA, committed to its Article 1(1) aim and consistently acting in good faith, it can expect to be able achieve that (proximate) objective, even in the event of challenge.

Voluntary withdrawal from the EEAA is explicitly accommodated by its Article 127 which specifies a twelve-month notice period. The very existence (fifteen years before the appearance of Article 50 in the Treaty of Lisbon) and relative permissiveness of the exit mechanism are not accidental: *Article 127 was 'tailor made' for countries that might soon wish to transition into the EU. It is an equally good fit for a country that wishes to transition away from the EU.*

If Article 127 notice is not given to all other Contracting Parties by or on 29 March 2018, the applicability of the EEAA immediately after Brexit is not thwarted by the Agreement's territorial provisions (at Article 126) as some lawyers have suggested would be the case. Such suggestions, based on what can be referred to as 'exclusionary' interpretations of Article 126 (because the effect is to exclude the UK from effective participation in the operation of the EEA Agreement), appear to have ignored the entailments of international law.

Article 29 of the Vienna Convention on the Law of Treaties (VCLT), dealing with the territorial scope of treaties is clear in stating that:

"Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

The condition in Article 29 (*"... a different intention ..."*) has not been shown to be satisfied by advocates of an exclusionary interpretation of Article 126. Article 29 of the VCLT implies that there is a burden of proof to be discharged, but no reasoning and evidence has been put forward that comes anywhere close to being able to bear that burden.

An intention to exclude cannot be read directly from the text of the Agreement and nor is it "otherwise established". There is no indication in its text that Article 126 is intended to do anything other than serve the bog-standard, customary function/purpose of a territorial provision in an international Treaty, which is clarification of the territorial commitments that are made by the contracting parties themselves (see further below).

Had there been such an intention it is to be expected that it would have been clearly signalled since, quite obviously, a major reduction in the territorial coverage of the Agreement arising from the exclusion of one of its largest economies would have adverse implications for the Agreement's aim, which is set out at the very beginning of its text at Article 1(1). This is specified in terms of promoting trade and economic cooperation *between the Contracting Parties*, and the UK is one of those Contracting Parties.

Similarly, the contextual historical evidence points to a conclusion that Article 126 was <u>not</u> intended to have exclusionary effect. Its actual intentions can easily be checked (a) with surviving officials who were around at the time of its drafting and (b) by reference to the history books: the EEAA was developed in a period (1989-1992) of rapid political and economic change in Europe when the Delors Commission was operating in an even more expansionary mode than usual (the more general policy aim being the bringing of <u>all</u> the close European neighbours of the EU into deeper trading and economic cooperation arrangements).

In relation to the question of territorial provisions in Treaties more generally, Article 29 of the VCLT was developed from a proposal (to similar effect) originally put forward in the Third Waldock Report (1964).[5] The Article was adopted on a 97-0 vote of the parties to the Vienna Convention. Waldock explained the rationale of what later became Article 29 (VCLT) as follows:

"The rule that a treaty is to be presumed to apply with respect to all the territories under the sovereignty of the contracting parties means that each State must make its intention plain, expressly or by implication, in any case where it does <u>not</u> (my emphasis) *intend to enter into the engagements of the treaty on behalf of and with respect to all its territory. Such a rule seems to be essential if contracting States are to have any certainty and security as to the territorial scope of each other's undertakings."*

Commenting on Article 29, Professor Villiger[6] notes:

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[5] *Third Report on the Law of Treaties*, by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission, 1964,vol. II.

[6] M.E. Villiger, *Commentary on the 1969 Vienna Convention of the Law of Treaties*, Martinus Nijhoff, Leiden-Boston, 2009.

"The position of the opening sentence of Article 29 emphasises that it falls primarily on the States parties to a treaty as sovereign entities themselves to determine the scope of application of the treaties they conclude – in particular whether the treaty shall apply to the State's entire territory or only to certain parts."

The purpose of Article 126 of the EEAA Agreement is simply to set out the territorial commitments made by each party, in particular by identifying those parts of its own territory to which the EEAA will not be applied, or will be applied in more a more limited way. That this was the intention is indicated, *inter alia,* by the fact that the great bulk of its text is devoted to the Åland islands, a Swedish speaking archipelago in the Baltic Sea which is part of Finland.

The UK's territorial commitments having been decided in 1992, they were simply recorded in Article 126 alongside those of the other Contracting Parties, albeit this was done for Member States of the EEC (for expediency in drafting) by reference to textual passages in the EEC Treaty, where a detailed record already existed for countries that had gone through the process at earlier times. This expedient was not available for the Åland islands – at the time the EEAA was drafted Finland was not a member of the EEC – and hence the textual dominance afforded to this small territory in Article 126. The UK's territorial commitments to the EEA do not change in consequence of Brexit: all that will happen is that a convenient cross-document reference will be lost.

Brexit (withdrawal from the Treaty of Lisbon) will therefore mean that, with its current wording, Article 126 will no longer explicitly record the UK's territorial commitments: it will be silent on the matter. What was neatly convenient drafting in 1992 will no longer be neatly convenient drafting post Brexit. The implication is that, at some time in the future when it is expedient to do so, the silence should be ended: it is a trivial drafting exercise. This is how things were done when Austria, Finland and Sweden transitioned into the EU, with a lag of over nine years between their accession to the EU (at the very beginning of 1995) and the consequential drafting adjustments to Article 126 (which were made in 2004). Indeed, given the well-understood, historical UK territorial commitments to the EEAA, drafting adjustments are not strictly necessary at all.

To summarise, to the extent that there is any perceived ambiguity arising from a new-found, textual silence on the UK's territorial commitments, it is appropriately resolved by reference to Article 29 of VCLT, which was specifically designed for this (resolution of ambiguity) purpose (see Waldock and Villiger).

Immediately on Brexit day the UK will acquire all the competences required to operate the EEAA. Those competences that are necessary to discharge the UK's EEAA obligations, but which currently lie with the EU in consequence of the UK's membership of the EU under the current shared competence arrangements of the EU, will automatically transfer back to the UK, putting the country in the same position as the other non-EU members of the EEA. Iceland, Liechtenstein and Norway do not lack the required competences and neither will the UK.

There is however one substantive issue to be addressed: for the EEAA to be operable the UK must find a place in one or other of the two 'governance pillars' established by the Agreement, or alternatively it must seek to negotiate the addition of a third pillar.

Given the Leave vote, the obvious choice is the EEA-EFTA governance pillar which was explicitly constructed so that non-EU members of the EEA would not be subject to ECJ and European Commission oversight. This would require accession to the existing *Supervision and Court Agreement* of Iceland, Liechtenstein, and Norway, which would in turn entail negotiations with those three countries. The EEAA itself would then need minimal amendment: addition of the words "the United Kingdom" to the list of states defined as 'EFTA States' would do it (and since the UK was a founder member of EFTA and there is a realistic possibility that it could seek to become a member again, that would not be a completely arbitrary thing to do). The UK would thereby become an 'EFTA State' for the purposes of the EEAA, but this does not imply that it must necessarily become a member of the European Free Trade Association (EFTA).[7]

A successful outcome is likely for at least three reasons: (a) these are administrative and judicial arrangements that have little bearing on the wider commercial policies of the three, existing non-EU members of the EEA (a UK application to join EFTA itself would raise bigger issues, but that is a post-Brexit issue); (b) UK accession would strengthen the standing of the non-EU countries by leveraging their existing influence on new EEA legislation (see the paper *Brexit and the political economy of regulation*[8] for an assessment of the rule-making influence of non-EU members of the EEA); and (c) the three countries are themselves under good faith obligations, buttressed by commercial incentives, to ensure that the Agreement is operable. For each of Iceland and Norway, the EEAA is an enhanced free trade agreement with its largest or second largest export market (the UK). Why would the Governments of those countries want to see an agreement covering their access to that market terminated? And why, for that matter, should the UK want to abandon an existing FTA with two close trading partners?

It would, of course, also be possible for the UK to seek to remain within the EU governance pillar of the EEAA for a transitional period and that would entail negotiations with the EU. Unlike accession to the EEA-EFTA pillar, however, the EU-pillar option would run counter to the referendum result: it would imply continuing European Commission supervision (control) and continuing ECJ jurisdiction post Brexit, including on politically sensitive matters such as the interpretation of the expression 'free of movement of workers/persons'.

Seeking to negotiate temporary, bespoke substitutes for the EEA-EFTA Surveillance Authority and the EEA-EFTA Court would be a disproportionate exercise for a transitional period and

[7] For the purposes of the EEAA, the term 'EFTA States' does not mean 'current member states of the European Free Trade Association': the meaning of the term is defined at Article 2(b) by means of a simple list of the countries so designated/labelled. The list does not include Switzerland, for example. *De facto* the list comprises all those contracting parties that are not members of the EU. The 'EFTA' labelling is simply a convenience, signifying a common characteristic of the countries concerned, rather in the manner that Estonia, Latvia and Lithuania are referred to as the 'Baltic States'. It is too little appreciated that the European Free Trade Association (EFTA) has no substantive, formal standing in the EEAA Agreement itself.

[8] www.rpieurope.org/Publications/Essays_New_Series/Essays_NS_7.1_Brexit_and_the_political_economy_of_regulation.pdf

likely infeasible. It would require substantial amendment of the EEAA itself and any Contracting Party, including Iceland, Liechtenstein and Norway, could raise objections. If the matter were to be pursued, the appropriate timing for negotiations would be post-Brexit.

From a strategic economic policy perspective an outstanding benefit of retention of EEA membership is the optionality it affords in relation to future policy developments. Holding tight to EEAA rights does not foreclose pursuit of other, longer term options and can be used in combination with them, but it does provide a safety net or insurance policy that serves to weaken 'threat points' against the UK in negotiations. Put another way, it increases the UK's bargaining strength and provides protections against getting caught in dead ends.

The EEAA ticks all the major Leave boxes: full parliamentary sovereignty regained, including the ability to make international trade agreements; a *de facto* veto on the introduction of all new EEA legislation; no supremacy of EU law; no direct effect of EU Regulations; no sub-ordination to the ECJ (and the EEA-EFTA Court's influence would be significantly enhanced by UK participation); no financial contributions to discretionary EU budgets; no common agricultural and fisheries policies; no EU citizenship; power to control *aggregate* residency numbers or immigration flows (free movement of workers entailments apply at the level of *individuals* – workers/persons – not at the level of aggregate stocks and flows, and any decent economist can explain how it is possible to limit the latter without undermining individual economic freedom); a much shorter rule-book than the EU, because of a much more narrowly economic aim (set out at Article 1(1)); and so on.

In relation to regulatory matters, the provisions of the EEAA are much misunderstood and this is arguably an aspect of a wider lack appreciation of the characteristics of regulatory processes and of the nature of 'regulatory competition' between alternative systems of rules. The idea that the UK would necessarily be a passive 'rule-taker' in the EEA derives from a Norse myth, first told by a pro-EU government seeking to persuade a sceptical Norwegian public that the country should join the EU: it was the negative advertising of political partisans. Credulous commentators in the UK have, without pause for critical thinking or further investigation, simply believed the myth and passed it on: they have not checked the reliability of their sources.

In fact, the incorporation of EU Directives and Regulations into EEA legislation is a decision that falls to the EEA Joint Committee, which can reject or amend proposals, for example because they are not 'EEA relevant' or because they require adjustment to reflect the circumstances of the EEA's non-EU members. The decision process is consensual, implying that each party has a *de facto* veto in relation to incorporation decisions. Since EEAA membership also comes with 'decision shaping' rights in relation to original EU legislation, it would provide the UK with *greater* rule-making influence during a transitional period that any other, currently articulated alternative.

In relation to budgetary matters it is also not well appreciated that EEAA participation by non-EU states does not entail mandatory contributions to the general EU budget: all expenditures on co-operative programmes are controllable at the national level.

In conclusion, non-surrender of existing EEAA rights would, in the immediate post-Brexit period (i.e. from 30 March 2019 on), yield: a deep and special (the EEAA is *sui generis*), multilateral free trade and economic cooperation agreement not only with the EU, but also with other non-EU EEA members; current and future policy optionality (e.g. it could be replaced at a time of the UK's own choosing, if/when something better had become available); national control over borders, laws and money; and an escape from the process of political integration that is specified in the EU Treaties.

3. Further thoughts and comments

3.1 The EU's Internal Market (EUIM) versus the EEA

Looking back with the benefit of hindsight, if writing it today the most significant change I would make to *Brexit and the Single Market* would be to highlight, right at the outset, the major differences between the EU's Internal Market (EUIM) and the EEA.

The two institutions have routinely been conflated in arguments about Brexit. Each has been referred to as 'the Single Market' and it is almost invariably far from clear which of the two is being referenced in any given usage of the term. Whether intentionally or not, the conflation has been a major obstacle to sensible discussion and the British people have, in effect, been systematically misled on a matter of considerable economic significance. To the extent that the EEA has been mentioned it has typically been via references to the 'Norway option', which itself is a potentially misleading characterisation. It invites a focus on how things have worked out for Norway *in the past*, but there is every reason to expect that, post Brexit, the EEA would function differently, for Norway as well as for Britain.

The appropriate evaluation required is not unlike that entailed in the event of a merger between two businesses operating in the same market. The shift in the balance of power that takes place will change the subsequent market dynamics. In evaluating the effect of a merger between two businesses the Competition and Markets Authority (CMA) looks *forward*, seeking to assess the future, consequential effects of the change in the balance of power. The CMA would be mocked if it simply *assumed* that the future will necessarily look just like the past – that is a possible conclusion after investigation, but only *after* investigation – yet that *assumption* has been repeatedly made, without investigation, when the 'Norway option' has been discussed.

The distinctions between the EUIM and EEA matter precisely because the aims and provisions of the respective 'rule-books' differ in major ways. The EUIM is close to the Delors conception of the 'Single Market' whereas the EEA is closer to the Thatcher vision (although less constraining on the UK Government than the Thatcher vision in several important respects, e.g. no customs union; no supremacy of EU law; no common agricultural, fisheries or commercial policies – these being things that Mrs Thatcher took as givens in consequence of EU membership, but which are not givens for non-EU members of the EEA). To believe that the two arrangements are in some sense broadly equivalent it is necessary (but not sufficient) to believe that the views of Delors and Thatcher were similar. They very obviously were not.

Since the EUIM rule-book is embedded in the Treaty of Lisbon, it is correct to say that the UK will automatically leave the EUIM on Brexit Day: the country will leave that particular 'Single Market' (although the European Council's initial proposals for a standstill period contemplate replacing it with a close approximation that, where it differs from the EUIM, is inferior from a UK policy perspective). On the other hand, for the reasons already given it is wrong to say that the UK will automatically leave the EEA on Brexit Day. That is a matter of choice, a decision yet to be made. As might be inferred from the summary above, my view is that the decision to be made should be almost a 'no-brainer' on standard policy criteria (and should be made and announced as quickly as possible, both to ease political/regulatory uncertainty and to get UK policymaking back on to the front foot).

Once the differences between the EUIM and the EEA are recognised it becomes clear that, during the referendum campaign, no major advocacy group claimed that Brexit would imply exit from the EEA. Where criticisms of the Single Market were made by Leave campaign groups, examination of the relevant documents, speeches and interviews indicates that the criticisms were centred on precisely those characteristics of the EUIM that are not shared by the EEA: ECJ jurisdiction, majority voting, direct effect of EU Regulations, the EU customs union and common commercial policy, the common agricultural policy, the common fisheries policy, the goal of an "area without internal frontiers", mandatory contributions to the general EU budget, etc.

In effect, Leave campaigners emphasised that *the EUIM significantly reduces the UK's sovereignty over borders, laws and money*. The relevant point now is simply that *the EEA does not do that*: it is a different institutional animal, a different system of obligations and rights, notwithstanding that it shares substantial parts of the EUIM rule-book (most of which cover non-contentious technical matters).[9] The major differences between the two rule-books occur precisely where there are major underlying differences in economic policy and political aspirations between the EU and the non-EU states. The freedom of non-EU members to negotiate their own trade agreements is set out in the EEAA's preamble and its much narrower objective – which necessarily has implications for interpretation of legislation (e.g. what is meant by 'free movement of persons') – is defined at Article 1(1). These differences appear in the headlines, not buried in the detail, and they could hardly be clearer.

Even if, contrary to the evidence[10], the majority of EU legislative acts were incorporated into the EEA it would be a mistake to assume that the economic implications of the common elements of the two rule-books necessarily dominate the implications of their differences. Rule-books or instruction sets do not function in this way. Abolition of the off-side rule in soccer would leave the vast bulk of the rule-book of the game unchanged, but it would have very significant effects on the way the game is played (and on its likely attractiveness to spectators). Changes to modest parts of the code of a computer programme can substantially change a user's experience and a bug in one line of code can crash the whole programme.

[9] Assessment of the relative significance of the shared legislation has been a controversial area, characterised by the incidence of several manifest errors. Eliminating estimates that rest on such errors suggests that the common elements amount to between about 20% to 30% of EU legislation.
[10] Ibid.

These are *systems* of rules and are properly assessed as such: it is how a system of rules functions holistically that matters for performance.

It is easy to see how confusion has arisen. The same term ('Single Market') has been applied to two different sets of institutional arrangements (rule-books) and the conflation has been reinforced by use of the definite article ('the Single Market'). The first set of institutional arrangements (the EUIM) has major features that are disliked by large sections of the British public, but those features are absent from the second (the EEA). It is therefore all too easy to be misled into throwing the baby out with the bathwater.

3.2 The EU customs union

Similar points apply in relation to the EU Customs Union, e.g. it is defined by provisions of the Treaty of Lisbon and the associated Treaty on the Functioning of the European Union (TFEU), but it makes no appearance in the EEAA. As in relation to the EUIM, the UK will automatically leave the EU Customs Union on Brexit day.

A debate about whether to remain in or to leave 'the Single Market and the Customs Union' is, therefore, almost inevitably a muddled debate. Brexit necessitates leaving 'the EUIM and the EU Customs Union'. The substantive questions for the immediate post-Brexit period (the transitional or standstill period) are rather:

- Should the UK remain in or leave the EEA, i.e. should it voluntarily surrender, or acquiesce in the extinguishing of, (valuable) existing Treaty rights?
- Should the UK seek to negotiate a new customs agreement with the EU and, if so, what should be its general characteristics?

The reality is that, for obvious reasons of practicality and administrative expediency, Government and Parliament will likely want to retain rigid tariff convergence with the EU customs union for a period following Brexit. Similarly, there will be reluctance to see immediate, post-Brexit introduction of any form of customs controls at national borders that are currently internal to the EU, particularly at the Irish Border.

This implies an affirmative answer to the second question, at least for an initial period post-Brexit, and the achievement of such an agreement seems eminently feasible. Tariff rate convergence is a matter that can be determined *unilaterally* by the UK (the UK can 'shadow' the EU tariff rates, as lodged with the WTO), but the second desideratum (no customs controls at UK/EU borders) cannot be (at least without breaching WTO rules) and it will require the negotiation of new arrangements with the EU.

Such new customs arrangements do not necessarily have to include restrictions on the negotiation and signing of new international trade agreements by the UK. Restrictions of this type would not be 'objectively justified': they have no material implications for the operation of a transitional customs agreement and, if introduced, would imply an unnecessary prolongation of the EU's common commercial policy. This would not be responsive to the referendum result.

The crunch on customs issues will only come at the time that any new UK FTAs come into force or at a time when, even in the absence of such agreements, the UK unilaterally opts to end an initial, exact replication of the EU tariff rate structure. Meanwhile, identity of tariffs coupled with a fairly basic 'bill and keep' agreement[11] between the UK and the EU in relation to customs receipts could suffice to obviate any need for customs checks at the relevant borders.

3.3 Transitions and end states

There was no extensive discussion in *Brexit and the Single Market* of recourse to transition periods of *predetermined* lengths, because we have very limited foresight of how things might stand in more distant, future years. Such uncertainty renders commitments to predetermined time periods both risky and economically costly, which is one reason why good strategies tend to be characterised by the specification of proximate objectives. The existence and form of Article 127 is central to the efficacy of the EEAA as a proximate objective.

To illustrate the problem, consider an agreed standstill period that would see all trading and customs arrangements staying the same as they are now until 1 January 2021. Businesses contemplating investment decisions in 2018 will naturally be interested in what might be expected to happen in the post-agreement period (starting in less than three years' time): it will affect the profitability of their investments. They will gain little reassurance from a generalised statement to the effect that a new, comprehensive trade deal will have been negotiated and be ready for implementation by 1 January 2021. That looks exceedingly ambitious and it conveys more than a hint of a Government view of the world that is not congruent with political and economic realities. For example, it signals little awareness of the fact that the predicted outcome is not something over which the UK Government has any great degree of control: *inter* alia, the outcome will depend heavily on EU attitudes and decisions and on 'events' (e.g. a second, global credit crisis in the intervening period – which it is reasonable to characterise as a realistically possible event – could give rise to major policy reappraisals).

Without the EEAA to fall back on, the inferences that might reasonably be drawn by investors from articulation of such a policy are not favourable to UK interests. The policy might alternatively be characterised as detached from reality (Panglossian, self-obsessed), hubristic or deceptive. Each of these possible inferences is unnerving for investors: each will tend to increase policy/regulatory uncertainty.

Quite apart from the effects of these possible assessments of Government attitudes, sentiments and conduct, an underlying uncertainty about outcomes would remain. Recognising that, even in a better-case scenario, the negotiating process might easily come to be subject to significant delays, it is reasonable and prudent to ask: how will things appear as the terminal date of the

[11] 'Bill and keep' arrangements – used in the USA, Canada, Hong Kong and Singapore to provide 'charge free' transfers of electronic signals across telecom network boundaries – would mean, for example, that goods from outside both the EU and the UK that are landed at, say, Dublin would pay the (common) customs duties to the Government of the Republic of Ireland, even if the goods are destined for Belfast, and similar goods landed at Belfast would pay the same duties, but to the UK government, even if they are destined for Dublin. Similarly, checks for regulatory compliance and for rules of origin purposes would be done once, at the place of first entry into an economic zone defined as the EU plus the UK.

transition period comes ever closer? Several possible outcomes might be anticipated, ranging from attempts to negotiate further extensions of the standstill period, through a basic FTA (with little coverage of the services that comprise the bulk of UK economic activity) to an application to re-join the EU (nothing much would have changed in the standstill period, so that possibility would be operationally straightforward). Again, the tendency is to create incentives for potential investors to 'wait and see' before committing expenditures to projects whose business cases are sensitive to the final, negotiated outcome.

The general problem is that today's government cannot easily provide believable/credible reassurances as to how it or a successor government will conduct itself in 2020. The *policy credibility* or *time consistency problem* that is always with us in economic policymaking takes an extreme form in current UK circumstances: political divisions are creating an unusual level of volatility in policy purposes, aims and priorities. These things are simply not stable. To pretend that they are stable when they manifestly are not would likely add to an already deep scepticism concerning the veracity and reliability of political statements.

Good policy strategy would be better focused on seeking out more immediate, achievable steps forward which, whilst directed at stable aims and purposes, provide for flexibility in adapting to unpredicted and unpredictable changes in circumstances. The EEAA meets this criterion. It scores highly in terms of its 'option value' because of the short notice period for withdrawal in its Article 127. As discussed, this exit provision was 'tailor made' for transitions, i.e. for change and adaptation.

The EEAA also scores highly in its likely contribution to stabilising expectations and reducing regulatory uncertainty. The Article 1(1) aim of the EEAA is highly consistent with historical UK commercial policy – hence continued commitment to it would be a behavioural reaffirmation of that policy – and the Agreement itself, being multilateral, is in line with traditional UK policy views on the relative merits of multilateral and bilateral approaches to international trade issues. It would be an immediate, understandable and concrete response to an immediate and concrete question.

The expression used in *Brexit and the Single Market* was that the EEAA was *"sufficient unto the day"* (the 'day' in mind being the period up to around 2021), but an alternative characterisation of the strategy could have referenced Field Marshall von Moltke (*"no plan of battle ever survives first contact with the enemy"*) or Robert Burns (*"the best laid schemes o' mice an' men gang aft agley"*). What can and should survive, and not 'gang agley', are underlying aims and purposes. Flexibility and adaptability, coupled with steadiness of purposes and aims, are important strategic assets. The EEAA would secure those assets in the immediate post-Brexit period.

Rather than focusing on the prioritisation of immediate, concrete actions to develop *options* for the future, however, much of the fiercest advocacy surrounding Brexit has placed a peculiar emphasis on the question of which of the potentially conceivable *end states* should be selected *now* as the policy aim. The arguments have been, and still are, about how things should be in an unknown and unknowable future over which control is necessarily limited.

This is to turn what should be a matter of practicality, i.e. *deciding* on means to achieve stable ends, into an ideological issue. It creates unnecessary vulnerabilities and fragilities: what today might appear to be the best way of proceeding in the longer term might look very different in a year's time, when it is viewed in the light of later events and of new information.

Non-surrender of EEAA rights would greatly mitigate risks without foreclosing future options. There is, for example, no conflict in pursuing a longer-term end state such as a Canada+ option whilst sticking with the EEAA on 30 March 2019 and in the immediate period thereafter. *This would just be a particular implementation of the twin-track strategy approach noted at the outset.* The key lies in getting the *policy sequencing* right.

The EEAA is immediately available to operate and is immediately available for development (the EEA's own dynamics can be expected to change if the UK continues to be a member – a non-EU bloc of 5+ million people will become a bloc of 70+ million people overnight and would become a bloc of around 80 million people, if, as is quite possible, Switzerland subsequently joined (perceptions of the EEA in that country would almost certainly be affected by UK participation as a non-EU Contracting Party).[12] It is the initial stage of a policy journey, but it doesn't predetermine the later stages of the journey. Decisions that can only finally be taken in the future can be left to the future, reducing vulnerability to unexpected events in the meantime.

A focus on end states or ultimate destinations (which are never really ultimate, because history does not end – every ending becomes a new beginning) tends to distract attention from the more immediate task of making a 'good start' to the journey. And as the Irish proverb has it: *Tús maith, leath na hoibre* (a good start is half the work/journey).

3.4 Legal interpretation

Initially the Government took the view that the UK would automatically cease to be Contracting Party to the EEAA on Brexit day, but the rationale for that view was never made clear. To the question 'why is that?', the nearest approximation to an answer was 'because the UK is a Contracting Party to the EEA only in consequence of its EU membership'. That, however, simply begs the question.

This first view of the Contracting Party issue appears to have been subsequently abandoned, at least partially: in a High Court case in February 2017 concerned with questions surrounding Article 127 of the EEAA the Government's lawyers indicated a recognition that Brexit would not give rise to termination of the EEA Agreement *ispo jure*. However, Government thinking since then has remained opaque, the only detectable sentiment being that, in some unidentified way or another, for some unarticulated reason or another, the EEAA will *automatically* become

[12] The Swiss government already appears to be reviewing its existing policies toward the EU and the EEA in response to difficulties in operating some of its major, bespoke, bilateral agreements with the EU, for example those covering free movement of workers and the recognition of equivalence in financial services regulation. The President, Doris Leuthard, has gone so far as to express the view that the EU appears to be seeking to weaken the Swiss financial services sector, which accounts for a roughly similar proportion of GDP as the UK financial services sector. Zurich's problems today may be an indicator of London's problems tomorrow, if the UK follows Switzerland's hitherto bilateral approach to trading arrangements.

irrelevant on Brexit day, although not necessarily as a direct consequence of withdrawal from the Treaty of Lisbon!

Perhaps the most explicit claim has been that, irrespective of the Contracting Party status of the UK post Brexit, the EEAA will no longer be applicable to the UK after 29 March 2019, because of the provisions of Article 126. That proposition was extensively discussed in *Brexit and the Single Market* as early as July 2016 and the main points have been restated above. All that needs to be added is that, notwithstanding the high importance of the economic and political issues at stake, no substantiation for the claim has been put forward and, in particular, no reference has been made to the relevance of international law when considering the issues (an area of law to which it might reasonably be expected that the Government of a global trading nation would pay some attention when questions of Treaty interpretation are at issue). The lack of reasoning is itself revealing.

A secondary argument that has sometimes been mentioned in passing, but not stated as unequivocally as the Article 126 claim, is that the EEAA will cease to be operable after Brexit because the UK will not be a member of EFTA. One source for this view is a cherry-picked fragment of text from a lecture by the President of the EEA-EFTA Court, Professor Carl Baudenbacher, given in London in October 2016. However, Professor Baudenbacher has made it clear on multiple, subsequent occasions, in lectures and in articles through to December 2017, that he believes that the UK could feasibly 'dock' to the EEA-EFTA governance pillar established by the Agreement, and it is this participation in the EEA-EFTA institutions that is required for operability, not membership of EFTA itself.

The Government's legal advice on these matters remains undisclosed and no substantive arguments have been offered as to why Parliament and people should be deprived of this information. There appear to be only disadvantages for the UK in the position on Article 126 that the Government has taken (it would imply surrender of valuable options without any due diligence in testing out whether the surrender is necessary as a matter of law). The obvious inference to be drawn is that the reluctance to have the relevant matters more thoroughly examined is a political tactic aimed at suppressing Parliamentary and public scrutiny of an issue that is of considerable importance for public welfare. If the inference is correct, the implication is that it reflects an implicit recognition by the Government that withdrawal from the EEAA on Brexit day would not reflect majority opinion in Parliament or among the people.

Such an appreciation of the situation would, I think, be a correct one[13], but what appears not to be currently recognised is that it will greatly strengthen the strategic position of the Government in the Brexit process as a whole, if this opposition is <u>not</u> suppressed or circumvented. The current emphasis on tactical manoeuvring which has left the Government persistently on the back foot (not in control of events) and internally divided could be replaced,

[13] My own reading of the evidence is that, if a series of binary choices were offered in which the alternative options for the immediate post-Brexit period were (a) the EEAA and (b) non-EEAA Option 1, non-EEA option 2, non-EEAA option 3, etc, the EEAA would command a significant or substantial majority vote in each and every case, both in Parliament and in a popular vote. It is not easy for a Government to buck such an alignment of Parliamentary and public opinion, but my bigger point is that, in the current context, it is folly to want to do so in the first place.

almost instantly, by a coherent *strategy* that would, for the reasons given above, provide a 'strong position' from which to address all negotiations beyond March 2018.

Issues of legal interpretation also arise in the more general context of economic regulation. There appears to be a strong tendency/bias in parts of the British administrative and legal systems to interpret the words used in the text of European regulations as much more constraining than they are intended to be or that, as a matter of observation, they are taken to be in practice elsewhere in the EU (over the years I have myself encountered this bias on very many occasions across a range of different regulatory contexts). This may be linked to a failure to appreciate that (a) the texts are themselves products of multilateral international agreement among EU Member States and (b) that fact should properly colour the interpretation of Regulations and Directives, consistent with the interpretive weight given to aims and purposes by both international law and *a fortiori* EU law.

The underlying cognitive bias (towards a narrow or 'pixelated'[14] regulatory literalism) tends to reinforce more general misunderstandings concerning the differences between the EEA and the EUIM. It is, for example, often argued that the EEA-EFTA Court simply mirrors the judgments of the ECJ. That it doesn't always do so is an established fact, but the more important point is that it *cannot* legitimately act as a mirror. The Court is a creation of the EEA Agreement, which differs in its aims and provisions from the Treaty of Lisbon. It must reach its own judgments, based on the EEAA, not on the Treaty of Lisbon. The exact same text in a Directive or Regulation can have differing interpretations in the two Courts. In practice the degree of rule harmonisation required to establish a 'market' is achieved not via mirroring, but by a process of active dialogue, including judicial dialogue.[15]

3.5 Regulatory alignment and divergence

At the time of writing, alignment and divergence are words that are prominent in the public eye, having been elevated to eye level by contentious issues to do with possible future arrangements at the border between Northern Ireland and the Republic of Ireland. This elevation has had the unfortunate effect of leading to an almost exclusive focus on the relationships between regulatory regimes and international trade flows, to the neglect of other effects and factors of relevance when considering those regimes.

It is generally recognised that, when applied to regulatory structures and processes in the round, the two words tend to be ill-defined and vague in their meanings, and it is not clear that they are at all helpful when talking about the nitty gritty of public policy. To illustrate the general problem, consider the rules and governance structures (the rules about rule-making and enforcement) of different types of football: soccer, rugby, American, Australian rules, Gaelic, etc. They have things in common and things that differ, but to talk generally about the degree of divergence or alignment between variants is neither particularly informative nor particularly

[14] A felicitous, descriptive word introduced by the Competition Appeal Tribunal to refer to an approach to assessment or interpretation that is akin to a process in which the content and meaning of a whole digital image is inferred from inspection of only a small set of the pixels that comprise the image.
[15] See C. Baudenbacher, *How the EFTA Court works – and why it is an option for post-Brexit Britain*, LSE Blogs, 28 August 2017.

interesting, if only because there is no obvious metric that would encapsulate the differences when these rule-books are assessed holistically.

The choices to be made in the Brexit process are reasonably specific and they are better examined in each of their more detailed, concrete contexts. They generally take the form of deciding which rules the UK wants to play by and which rule-making and enforcement systems it wants to take part in. In respect of regulatory governance, the UK is leaving the EU system, but it could stay the EEA system, which would be consistent with the UK also participating directly in global rule-making bodies as well as negotiating at some sets of rules bilaterally on a trade-agreement by trade-agreement basis (as Iceland and Norway do). Or it could leave both the (multilateral) European regulatory systems and rely only on membership of global bodies supplemented by a series of bilateral trade agreements.

An analogy for this last case might be a set of schools playing regular football matches against each other, but under 'bespoke' sets of rules, i.e. a different set of rules for each defined pair of schools: one for St Cuthbert's vs St Bede's matches, another for St Cuthbert's vs St Aidan's matches, and yet another for St Bede's vs St Aidan's matches. If that appears an odd thing to contemplate, it likely signifies an implicit recognition of the value to be had from playing to a common, basic set of rules (which typically would not exclude *justifiable* derogations, e.g. the St Aidan's pitch might, acceptably to all its opponents, be a little smaller than regulation, e.g. because the school faces land constraints).

There are one or two aspects of things concerning which some rather general statements have potential information content, the most obvious being that the greater the number of systems of rules that are established the greater are likely to be the regulatory costs and burdens involved. Imagine, for example, that: 100 economic agents trade regularly with one other; there is a set of rules for each bilateral trading arrangement; and that there is an associated governance structure for each bilateral rule-book. That would yield 4,950 rule-systems and 4,950 governance structures. It would likely be burdensome and costly to arrange, which is why over the course of economic history we have seen the development of markets. Markets are economic institutions (more widely shared sets of trading rules) that serve to reduce the costs of individual economic exchange transactions. Thus, in medieval England wool merchants could (and did) travel around from farm to farm and negotiate bespoke arrangements with individual sheep farmers, but the period saw the gradual development of wool markets that reduced the costs of doing business for both farmers and traders/merchants alike, to the benefit of the country's economic development.

These comments serve as a warning that it is unsafe to think that a shift in policy direction toward heavier reliance on bilateral/bespoke international agreements will amount to a form of 'de-regulation'. An outcome in which more national resources are devoted to regulation is much more likely to eventuate, and we can see that already happening in the early stages of the Brexit process. The EU and (to a lesser extent) the EEA rule-books may appear Byzantine, but to break up either into a much larger set of bilaterally agreed rule-books might come to look like Byzantium squared.

The Government would therefore be wise to heed Jacob Burckhardt's 19th century warning against the *terribles simplificateurs*, the ideologists who wreaked such havoc on Europe in the 20th century. With them in mind, the following examples provide shorthand illustrations of the kinds of concrete issues that can arise in different regulatory contexts. They should give pause for thought to anyone who thinks that binary rhetoric, e.g. a generalised opposition of alignment vs divergence, is appropriate and helpful when addressing regulatory issues.

Smart metering

An EU Directive (2009/72/EC) sets out the EU's policy on smart metering in energy, for transposition into national Regulations. The policy is: "*Where roll-out of smart meters is assessed positively, at least 80% of consumers shall be equipped with intelligent metering systems by 2020."* A positive assessment is one that has concluded that the introduction of smart meters is *"economically reasonable and cost-effective"*.

The 80% number is precise enough and it is meaningful to speak about, and easy enough to measure, deviations or 'divergences' between actual performance and that number. But how are economic reasonableness and cost-effectiveness assessed? Immediate answers are: (a) imprecisely and (b) differently in different Member States.

The EU legislation can be said to entail alignment in that a single Directive, a single text, applies across twenty-eight countries. There can be said to be alignment of 'law on the books'. More specifically, the same target (80%) applies to all Member States. When we look at the transpositions into national legislation and at national outcomes, however, we find that:

- The UK has set a national target for smart meter coverage of 100% by 2020, irrespective of costs.
- Germany has set no national target, but hopes to get to somewhere between 20% and 25% by 2020.
- Neither plan has been found to be in violation of the Directive.

That looks like a rather large 'divergence' between Germany and the UK, and in an obvious sense it is, but both approaches have (to date) been accepted as being compliant with the same Directive. There is alignment in one dimension (the legislation 'on the books') and very major divergence in other dimensions (interpretation of what is 'on the books' and implementation).

In this case and *of its own volition*, the UK has taken a substantially more interventionist, higher-cost regulatory approach than Germany, and it cannot be said that the pattern indicated by this smart metering example is particularly atypical (the costs imposed are higher than those of an average regulatory pratfall, but nowhere close to those of, say, the Hinkley Point power station). There are many other contexts where we find that:

- European regulation is focused on establishing common purposes and principles – convergence at that level of things – but is relatively relaxed about the precise methods adopted in pursuit of those purposes *provided they are demonstrably effective*.
- UK regulatory and administrative systems not infrequently exhibit tendencies toward: taking a literal and pixelated view of the meaning of relevant regulatory texts

('regulatory literalism'); giving inadequate thought and attention to the intended purposes of the legislation ('literalism', which requires less cognitive effort, is used as a substitute for thinking); and 'gold plating' of regulations (doing more than is necessary to meet the objectives).

Honey

The current regulatory system governing the market supply of honey sets a series of maximum residue levels (MRLs) for each of a number of chemicals (pesticides and antibiotics) that might potentially pose risks to human health. These are specific numbers, hence it is straightforward to calculate any numerical divergence for each chemical, although it is not clear how any overall degree of divergence from a benchmark defined by a multiplicity of MRLs would be measured. Monitoring and enforcement work – which is the source of most of the direct financial costs and burdens imposed by regulation – is a different matter. This work is focused on production facilities and is undertaken by 'local' inspectorates. For imported honey the relevant inspectorates are those of the exporting countries. What the EU does is to evaluate those regimes in terms of their integrity and effectiveness and deems each of them to be either acceptable (imports allowed) or unacceptable (imports not allowed). The evaluations inevitably rely on a degree of subjective judgment.

One set of issues concerns the levels of the EU MRLs: for example, are they currently set too low because of the way that the 'precautionary principle' is interpreted in the EU system? Another set of issues concerns the authorisation regime. Should the UK set up its own authorisation regime? If it did, it would encounter the problem identified above in relation to bilateral trade, i.e. increased costs due to duplication: it would, in effect, be replicating a process whose costs are currently shared with other States. Is it worth it? If not, should the UK seek to re-enter the established EU arrangements to achieve the economies of scale that are available? If it did, there would likely be a price to pay, which would be a matter for bilateral negotiation.

For example, if the stand-alone cost of an authorisation system is £X million, the Nash bargaining equilibrium (relevant for a bilateral negotiation) would point toward a payment outcome of around £0.5*X million. However, the EEAA (the result of a multilateral negotiation) has provisions to the effect that the payment for participation in EU programmes by non-EU countries is based on relative GDPs. With this type of rule, and assuming for simplicity that the UK participation would not add to authorisation costs, if UK GDP accounted for 16% of the EEA total, the payment would be £0.16*X million, about a third of the bargaining payment and about a sixth of the stand-alone costs. These are hypothetical numbers, but they do provide a first sight of the issues and of potential (relative) magnitudes.

Chlorinated chicken

If imports of chlorinated chicken were allowed, it could be expected to bring down prices to UK consumers, to their immediate benefit, but the economic effects don't stop there. Let me assume product quality (as experienced by end consumers) would not be affected so as better to focus on a bigger point, which is that at least part of the price reduction would be associated

with a change in animal welfare standards. To be able to compete on a level playing field UK suppliers would need to see a reduction in UK animal welfare standards. Allowing the imports would require these standards to be reduced across all domestic production, since all domestic production potentially competes with imports.

Domestic producers who serve both the UK and EU markets would have to comply with two animal welfare regimes. The Food Standards Agency would have to develop its own inspection regime to monitor and enforce the two different standards. Farm facilities would have to be organised to raise chickens in two different ways. All these things would put upward pressure on costs, and the segmentation of the chicken rearing processes could reduce flexibility in switching supplies between domestic and EU markets as price conditions change, worsening the international competitive position of domestic producers.

Most important of all are probably the impacts of any reduction in animal welfare standards on the large fraction of the public who are averse to animal cruelty. The effects on neurological activity in the human brain of looking at images of animal suffering – which are now observable via fMRI scans – add weight to the obvious proposition that, for many people, human welfare/wellbeing is directly affected by animal welfare/wellbeing. It is therefore entirely appropriate to take these effects into account when assessing a question such as whether or not to ban imports of chlorinated chicken. These (non-price) effects on human welfare don't predetermine the answer, but they are a highly relevant factor to be considered and weighed in the balance.

Comments

The following are a few things to bear in mind when reading or listening to abstract political rhetoric about alignment and divergence in regulation:

(a) These words tend to be associated with attempts to summarise in one-measure (we might think of an analogy with the angle between two straight lines) what are, in fact, multi-faceted or higher-dimensional regulatory realities.

(b) There is no simple, readily available metric for reducing the dimensionality of regulation in this way.

(c) Different regulatory approaches come with different costs and burdens and there is no simple, general equation linking a perceived increase in the degree of 'divergence' to lower regulatory costs and burdens. It cannot therefore be assumed that a greater freedom to 'diverge' equates to 'de-regulation': as for products and services, 'bespokeness' in systems of rules may come with much higher costs. Of course, loosening constraints on the decisions a national government can take may look like greater 'freedom' to a politician, but it is often accompanied by the placing of greater burdens and constraints (implying less freedom) on consumers, businesses and taxpayers.

(d) Harmonisation, meaning the process of seeking out sets of shared rules that (assessed holistically) work well in serving identified common purposes, is probably a more useful

concept: it links rules to purposes (the 'spirit of the rules') and, in market contexts, comes with an implied metric (the costs of engaging in exchange transactions, or 'transactions costs').

(e) A helpful first reference point for thinking about some of the trade-offs might be mobile phone and computer operating systems (OSs). There is competition between OSs, e.g. iOS vs Android, but equipment manufacturers and software developers tend to cluster around a relatively small number of 'systems of rules': each and every manufacturer/software pairing in a global marketplace does not seek to develop its own, 'bespoke' OS. The EUIM and EEA are a little like those OSs, with the added wrinkle that they are two systems that share significant blocks of code/rules.

(f) In Britain the flexibility afforded by the EU regulatory system has in recent years often been used to adopt more, not less, burdensome regulatory approaches and there is no convincing body of reasoning and/or evidence to indicate that this tendency will be altered by Brexit *per se* (see *Brexit and the political economy of regulation*). The root causes of tendencies towards regulatory literalism and gold-plating lie largely at home. The 'jobsworth' or 'stickler for the rules' is a familiar, quotidian character and *Bleak House* is a classic of English Literature, not French or German literature.

4. Ways forward

If the UK were to withdraw from the EEA Agreement, it would amount to a surrender of valuable Treaty rights. Such rights confer advantages even if they are not, in the event, exercised: *they have option values*. Withdrawal from the EEAA would therefore cause uncompensated harm to the British public. It would also imply the termination of an existing enhanced FTA with Iceland, Liechtenstein and Norway. In short, it would be a memorable own goal.

Whatever else is done, therefore, the UK Government would be well advised to indicate as soon as possible that it does <u>not</u> to intend to give Article 127 notice to withdraw from the EEAA before the end of any designated transition/standstill period. Ideally this would be accompanied by a statement to the effect that (a) it will be speaking with the Governments of Iceland, Liechtenstein about accession ('docking') to the EEA-EFTA governance pillar of the EEAA with a view to ensuring the operability of the Agreement post Brexit and (b) having considered the matter further it has concluded that international law supports the view that Article 126 is a customary 'territoriality' provision in a Treaty and, as such, is not intended to have exclusionary effects.

If the implied interpretation of Article 126 is challenged by the EU, it can be tested via international dispute resolution, but I very much doubt that it would come to that. Continuing UK participation in the EEA is expedient for the EU as well as for the UK and matters can be frequently be settled in a particular case without parties having to concede on what they might regard as a matter of principle, or without having to put a cherished or convenient belief at risk by exposing it to third party adjudication.

In seeking retained participation in the EEAA, it is important to recognise that non-surrender of EEAA rights does not foreclose the simultaneous pursuit of any other, significant Brexit option: it is a proximate objective and no more than that. For example, it does not preclude the pursuit of:

- A Canada+… type of agreement for the longer term (or indeed some other alternative that might come into view as the European economic and political environments change over time, as they likely will). That could be done and, if the negotiations were successful, Article 127 notice could be given a year ahead of the expected implementation date of any, longer-term agreement. Whether a Canada +… agreement can be successfully negotiated is a different matter and that is an obvious risk factor to be considered, noting that risks and delays can be expected to increase sharply with the number of 'pluses' sought by the UK.
- Negotiated, 'bespoke' adjustments to the EEAA via additional protocols and annexes.
- Transitional arrangements in agriculture and fisheries (remembering that the EEAA does not encompass the common agricultural and fisheries policies).
- Transitional customs arrangements capable of sustaining a *status quo* position at borders for a period after Brexit.

In assessing the prospects for the negotiation of its desired deep and special long-term relationship with the EU, the UK Government will need to be hard-headed and realistic about the prospects. EU aversion to cherry-picking is not a unique or idiosyncratic characteristic: it is an almost ubiquitous feature of complex negotiations. Achieving concessions typically requires the reciprocal yielding of concessions – hence the implications of adding more 'pluses' to 'Canada' – and getting a good balance of give-and-take will be rendered complex by the *de facto* existence of 28 counterparties, i.e. the EU and twenty-seven Member States, represented by governments with their own particular and differing concerns and anxieties. It might be remembered also that it is wise to be careful about what is wished for, particularly when the things desired are untested in practice or have proved problematic in practice in other contexts. For example, CETA has an investment court system, but it is as yet untried, while the Swiss-EU arrangements have a tried-and-tested political/diplomatic dispute resolution process that has proved problematic in practice for both parties.

These, however, are questions to be addressed in the future. The immediate questions for now are to do with optionality and insurance. At bottom, the additional optionality available from non-surrender of existing EEAA rights would act as a form of safety net or insurance policy which can be called upon if preferred alternatives run into difficulties and would provide a strong platform for the development of later, future positions.

An announcement that the UK will take out this insurance could be expected to have the immediately benign effect of reducing political and regulatory uncertainty. Given the post-referendum sterling depreciation, the obvious structural shifts in the economy called for by Brexit, and the upticks in growth in the rest of the EU and in the USA, the UK should now be experiencing something of a mini-boom in business investment. That is isn't is, I believe, largely attributable not to the referendum result, a receding bygone, but rather to the ill-effects of an excessively long period of policy dithering. The UK economy is relatively flexible and capable of adjusting reasonably quickly to one-off shocks. The problem is that domestic

politics has become a source of sequential, unpredictable disturbances, and that is a more difficult economic environment in which to operate.

Dithering has itself been a response to unusually intense ideological fractures in the governing party, but it also partly attributable to some of the issues discussed above: (a) conflation of the EUIM and the EEA, (b) failures in strategic thinking, particularly an over-emphasis on desired end states at the expense of a sharper focus on proximate objectives (perhaps associated with a lack of clarity about the 'sequencing' of decisions to be taken), (c) narrow or 'pixelated' approaches to legal interpretation and regulatory assessment, and (d) a propensity to reduce issues to ill-defined binary oppositions.

Whatever the cause, the absence of a coherent Brexit strategy has itself made the economic and political context more dynamic and uncertain (a positive feed-back loop), and these things point even more clearly toward the strategic value of clearly identified, proximate objectives. Such objectives have hitherto been missing from Brexit policy, but the good news is that it is within the power of the Government to first adopt and then quickly (within the next three months) achieve a particularly powerful proximate objective. Continuing EEA membership in the immediate post-Brexit period is very feasibly 'at hand'. The opportunity is there: it remains to be seen whether it will be taken.