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The European Economic Area Agreement: A short introduction

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Introduction

Our aim in this paper is to explain and comment on some of the principal features and implications of the European Economic Area Agreement (EEAA). A number of misunderstandings about the content and operation of the Agreement appear to have made their way into public discourse in the UK. We are concerned about the distorting effect of these, not only on public perceptions, but also potentially on the Government's position. Our hope is that this paper may help inform a more considered debate about the UK's Brexit destination.

The EEA is an international treaty aimed at strengthening trade and economic cooperation between its Contracting Parties, principally by reducing barriers to trade. The geographic scope of the Agreement is referred to as the European Economic Area (EEA).

To be a Contracting Party to the Agreement, as the UK currently is, amounts to what is often referred to as 'membership' of the European Single Market. Membership of the Single Market differs from 'access' to that market. Membership requires good faith commitment to the aims and obligations set out in the EEAA in return for similar commitments made by other Contracting Parties. Access means no more than an ability to trade in some way or other with countries that are parties to the EEA Agreement. Access could be on a variety of terms. It is therefore a general notion that encompasses a range of very different arrangements with very different implications for trade and commerce.

Prima facie the aim of the EEAA set out at Article 1(1) of its text, being principally an economic rather than political one, is in full accord with historic UK commercial policy and is consistent with the UK Government's stated aim of being a global advocate for free trade. Yet at the outset of the Brexit process the Government appears to have indicated that the UK no longer wishes to be a Contracting Party to the Agreement. How this paradoxical conjunction – profession of a commitment to free trade coupled with withdrawal from much the most important of the trade agreements to which the UK is currently a party – is to be interpreted is a matter of some importance.

Among other things, inferences drawn from the paradox have implications for today's economic decisions, particularly investment decisions, and for the UK's future reputation as a good faith trading partner. Investors routinely monitor governmental behaviour for signals of underlying attitudes and intentions and investors' interpretations of the signals affect their own

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attitudes and behaviours immediately, not just in some indefinite future. The same can be said of overseas governments who might become future partners in commercial agreements.

There are multiple, possible explanations of the paradox, the most obvious being that it is simply the opening move in a negotiating strategy that will be adjusted over time. Another is that the priority given to commercial objectives by the UK Government has been downgraded relative to other policy objectives. The various accounts are not mutually exclusive and they can share common factors, one of which is potential misunderstanding of the nature and implications of the EEAA. This is the issue that we explore in what follows.

As is the case for complex contracts more generally, international commercial agreements, including the Treaty of Lisbon, frequently contain significant ambiguities as to what they entail in differing circumstances: they are what in economics are called *incomplete contracts*. Resolution of ambiguities in the EEAA calls for interpretation of the Agreement and, at least for major issues, the most appropriate interpretative principles are those set out in the Vienna Convention on the Law of Treaties (VCLT), Article 31(1) of which states: *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

We draw attention to the VCLT at the outset because not only do we approach the EEAA on precisely this basis, but also because *purposive* interpretation of a text – captured in the words *"in the light of its object and purpose"* – does not sit easily alongside some of the more traditional approaches to legal interpretation in common law jurisdictions. It is therefore difficult to overemphasise the point that the EEAA is a document directed toward *a very clear commercial policy object or purpose* and that interpretation of the Agreement's implications and entailments should necessarily give a high weight to that fact, consistent with the principes enunciated in the VCLT.

We focus in what follows on the main text of the EEAA – a relatively short and readable document created to serve a well understood policy purpose (enhancement of trade and economic co-operation) – but also comment along the way on the Agreement's history and on some of the content of its Protocols and Annexes. The discussion is more extensive for those Articles of the EEAA that are of highest salience for the Brexit process.

Background history

In a speech on 17 January 1989 Jacques Delors, then President of the European Commission, introduced the idea of creating what he referred to as a 'Single European Economic Space' (later renamed the European Economic Area (EEA)) with the intention of extending the geographic domain of what by then had come to be called the European Single Market. The Single Market was itself an initiative of the Delors Commission, taken in response to slowing economic growth in the European Community (EC) in the 1980s. It was based on the introduction of a sequence of policy measures aimed at 'completing' the EC's 'Common Market'. A primary focus was on reducing or removing non-tariff barriers to trade, frequently

caused by differences in Member States' commercial regulations. The Single Market initiative was strongly supported by Prime Minister Margaret Thatcher, since reduction of trade barriers was a major plank in UK commercial policy.

In the 1970s and earlier 1980s the EC had seen significant enlargement as a result of the accessions of Denmark, the Republic of Ireland, the UK, Portugal, Spain and Greece, and the Delors initiative was another step in a general, expansionary process. At the beginning of 1989 the Western European nations (inclusive of Greece) were grouped into two trading blocks, the EC and the European Free Trade Association (EFTA). The UK had been a founding member of EFTA when it was established in 1960, as had Denmark and Portugal, but by 1989 these three countries had joined the EC. The other founder members of EFTA were Austria, Norway, Sweden and Switzerland. Finland (1961), Iceland (1970) and Liechtenstein (1991) subsequently joined the grouping.

The parties to the initial EEAA negotiations were the European Economic Community (EEC), the European Coal and Steel Community (ECSC), their Member States and the member states of EFTA. The negotiations eventually led to the Agreement that was signed in Porto on 2 May 1992. However, the period following the original Delors speech saw the ending of the political schism between East and West in Europe and possible participation in the EEAA was also considered for countries in Central and Eastern Europe and for Turkey. In the event, these potential participants preferred to seek direct membership of the EC itself, but the fact that EEA status was considered and discussed establishes an initial, salient point: around the time of its development, there is no indication of any strong policy intent to limit participation in the EEAA to member states of the EC and EFTA.

For the European Community (EC)[3] and the governments of the seven member states of EFTA, the EEAA was viewed as a stepping stone to subsequent membership of the post-Maastricht European Union (the Treaty of Maastricht was signed on 7 February 1992, three months' earlier that the EEAA, becoming effective on 1 November 1993, two months ahead of the EEAA becoming effective). There was, however, substantial public opposition in the EFTA states to eventual EU membership. Sticking points included the common agricultural policy, the common fisheries policy, the EC's customs union, and the surrender of national parliamentary sovereignty in some aspects of law-making. Particularly contentious aspects of the sovereignty issue included: the required acceptance of European Court of Justice (ECJ) jurisdiction; the 'direct effect' of EU regulations (which have force in EU states without any requirement for national parliamentary consent); and the notion of a common 'EU citizenship' (introduced by the Maastricht Treaty).

[3] European institutions have evolved over the years and this is reflected in sequential, published versions of the EEAA itself. The original Porto version has the EEC and ECSC as Contracting Parties. Later the ECSC was removed from the list and the term 'European Economic Community' was replaced by the term 'European Community'. In some versions of the Agreement published since the Treaty of Lisbon (2007) the term 'European Community' is replaced by 'European Union'. For convenience, we henceforth adopt the convention of referring to the EC in the pre-Maastricht period and to the EU in the subsequent period, noting the flexibility and pragmatism adopted in the process of making textual, 'labelling' adjustments to the EEAA. This is relevant when it comes to interpretation: it is safe to say that, in the development of the Agreement, narrow legal formalism has never been allowed to stand in the way of pursuit of settled public policy purposes.

In the event, only Austria, Finland and Sweden completed the transition to EU membership, in each case on 1 January 1995, following referenda in which the pro-EU shares of the votes were 66.6%, 56.9% and 52.8% respectively. In Switzerland, the question of accession to the EEEA, the first step in what the pro-EU Swiss Government planned would be later accession to the EU, was put to the electorate in a referendum on 6 December 1992 and was rejected by a very narrow margin (49.7% for, 50.3% against). The voting outcome has been widely interpreted as having been 'tipped' by voters who took their first available opportunity to say 'no' to the intended, eventual destination, i.e. membership of the EU. Although it had signed the EEA Agreement, Switzerland did not ratify it and hence did not become a Contracting Party.

In Norway, accession to the EEAA was not put to a popular vote, but there was a later referendum on EU membership in which 47.8% voted in favour and 52.2% voted against (an outcome almost identical to that of the 2016 UK referendum). The Government of Iceland favoured EU membership, but, in expectation that its electorate would reject a proposal to join the EU, it never proceeded to a referendum. Both Norway and Iceland therefore became Contracting Parties of the EEAA, i.e. members of the European Single Market, but not Member States of the EU.

The Agreement in outline

The Preamble

The Contracting Parties

The EEAA opens with a list of the Contracting Parties, who currently number thirty-two. Like any such Agreement it is binding upon the Contracting Parties, one of which is the UK: in the words of the VCLT, *Pacta sunt servanda* ("agreements must be kept"). It is a *multilateral* international treaty, i.e. a treaty encompassing more than two states. It is not a bilateral agreement between the EC and EFTA as is sometimes supposed.

In the text the Contracting Parties are divided into two sub-lists. The first sub-list comprises EC Member States plus the EC itself. The second sub-list now comprises Iceland, Liechtenstein and Norway, but it originally also contained Austria, Finland and Sweden. These three countries were moved from the second to the first sub-list when they joined the EU at the beginning of 1995. Other consequential textual amendments of a similarly technical nature were made to the EEEA at the same time, including to Article 126 (which is a highly significant Article for Brexit issues, see later). EFTA does not appear in either sub-list: it is not a Contracting Party. Indeed, in the absence of Switzerland, only about 40% of the aggregate population of the member states of EFTA is covered by the Agreement.

The EC appears in the list of Contracting Parties because of the 'shared competence' arrangements established by the EC/EU Treaties for EC/EU Member States. For some EEAA matters the EC/EU is the responsible party (see, for example, the Safeguard Measures provisions at Article 113(3) and the two-pillar EEAA governance structure, shown diagrammatically later in this paper). For other matters the responsible party is the Member

State. No such issue arises for Iceland, Liechtenstein and Norway: in each case it is the country's own government and parliament that is responsible for ensuring that obligations are fulfilled. EFTA plays no role equivalent to that of the EC/EU.

References to EFTA occur well over 100 times in a short document, whereas the meaning of the words 'EFTA states' for the purposes of the Agreement is defined only once, very briefly, in Article 2 as "Iceland, the Principality of Liechtenstein and the Kingdom of Norway" (see below). The consistent use of the label 'EFTA' throughout the Agreement to refer to the states of Iceland, Liechtenstein and Norway was likely of great convenience to the drafters of the EEAA: all three countries were members of EFTA and, if Switzerland had become a Contracting Party as originally intended, all the then members of EFTA would have been included. It is a misleading label nonetheless: it exposes the reader an obvious source of cognitive bias, 'repetition bias'. Repetition bias is a ubiquitous tendency to give undue weight or credence to a proposition or association that is repeated with high frequency. The false inference in this case is that the body called the European Free Trade Association (EFTA) is, somehow or other, a key player in the EEAA, whereas it is not. To mitigate any such bias, in what follows we will refer to Iceland, Liechtenstein and Norway as the NEU (non-EU) states.

The Recitals

The list of Contracting Parties is followed by a set recitals that performs the standard function in international agreements of setting out, in very general (sometimes grandiloquent) terms, the purposes and considerations that led the parties to conclude the treaty. Where these general statements have important bearings on the interpretation and application of the Agreement, the relevant matters are subsequently covered in the Agreement's Articles in more prosaic and specific ways. There is one exception: the final recital, uniquely, refers to what the EEAA is not intended to do. It says:

"WHEREAS this Agreement does not restrict the decision-making autonomy or the treaty-making power of the Contracting Parties, subject to the provisions of this Agreement and the limitations set by public international law;"

Such decision-making autonomy in respect of treaties is, of course, constrained for EU Member States, *but by the EC/EU Treaties, not by the EEAA*. NEU states retain their unconstrained treaty-making powers.[4] We therefore see here a first major difference between the entailments of the EC/EU Treaties and of the EEAA.

[4] It may be worth noting that the EEAA does not preclude a NEU state from joining the EU customs union on a voluntary, negotiated basis, either temporarily or for a longer duration. The point is simply that it does not require such participation.

Objectives and principles (Part I, Articles 1 to 7)

The primary objective (Article 1(1))

As indicated in the introduction, the aims or purposes of an international Agreement play a central role in the interpretation of its specific provisions and the primary or overarching objective of the Treaty is set down, right at its outset, in Article 1(1):

"The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area, hereinafter referred to as the EEA."

This overarching aim is, unlike the aims of the EU Treaties, unambiguously economic in nature, although it goes beyond the types of provisions that are to be found in many, less comprehensive free trade agreements (FTAs) in two respects. First, the scope of its coverage is broader, as indicated for example by the reference to *"equal conditions of competition"*. Second, the provisions go deeper, as indicated by *"respect of the same rules"*.

These characteristics follow from the intention to create a single market, captured in the words *"with a view to creating a homogeneous European Economic Area"*. Markets are social/economic *institutions* – sets of rules governing commercial conduct – whose primary purpose or function is to reduce the costs of exchange transactions, i.e. the costs of trading. One of the major sources of transactions costs, and hence of barriers to trade, is variation in market rules from place to place. Even in the absence of tariffs there can be very substantial non-tariff barriers to cross-border trade when significantly different sets of trading rules are applied on either side of a border.

Harmonization of market rules has, in fact, been a characteristic of commercial policy in the UK for over a millennium, an early example being the first attempts by English Anglo-Saxon Sovereigns to standardise systems of weights and measures across the Kingdom in the name of facilitating intra-Kingdom trade.[5] Much later the Act of Union between England and Scotland (1707) served similar (harmonising) purposes, and today, if it is to be more than a political sound-bite, the Government's aspiration to be 'a global leader in free trade' will necessarily entail active participation in international rule-harmonisation activities.

The entailments (Article 1(2))

The second paragraph of Article 1 takes us straight to what are probably the most fundamental issues of relevance for Brexit. It reads:

"In order to attain the objectives set out in paragraph 1, the association shall entail, in accordance with the provisions of this Agreement: (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)

[5] See the laws of King Edgar (*c*.959-957), *"let one measure and one weight pass"*, noting that effective enforcement took centuries to establish.

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 first four entailments are the infamous four freedoms, which first appeared over six decades ago in the Treaty of Rome, and it is the second, *free movement of persons*, that is much the most contentious.

In considering the issues raised by Article 1(2) and recognising the tendency of political language to inflate and exaggerate, it is important to note again that the specific obligations created by the EEAA are set out in its later Articles. It is these later Articles that give concrete meanings to what otherwise are abstract words. The non-operational nature of the four freedoms in the absence of greater specificity can be seen by asking the diagnostic question: *What is meant by the word 'free'?* There are many potential answers. To give a flavour of the issues involved, it can be noted that, if by 'free' is meant a market without rules, we are led immediately to an oxymoron. *A market <u>is</u> a set of rules*, both formal and informal, governing or regulating a certain type of human conduct (trade): if there are no rules, there is no market. That is 'free' markets, in this sense of the word 'free', don't (and cannot logically) exist.

The four freedoms as objectives

When first introduced in the Treaty of Rome it was clear that the four freedoms were objectives or aspirations, i.e. things to be worked toward. Europe at that stage in its history was replete with barriers to cross-border movements of goods and services, capital and labour. Thirty years or so years later, the Single Market initiative of the Delors Commission would itself have been unnecessary had not substantial barriers to cross-border movements still been a major feature of the economic landscape. Add another thirty years and it is still the case that there exist substantial regulatory barriers to cross-border trade in services. It is also a matter of simple observation that Liechtenstein, a Contracting Party to the EEAA, has enforced strict limitations on immigration throughout the whole period of its participation, i.e. not just on a temporary or emergency basis.

The textual content of the EEAA points to the same conclusion concerning the status of the four freedoms. They appear at the outset in the EEAA's text in Article 1 of Part I of the Agreement. Part I is headed "Objectives and Principles". The more specific *obligations* entailed by the EEAA follow in later Parts of the Agreement. Moreover, within Part I, the four freedoms are grouped with text that unambiguously sets out an object or purpose (Article 1(1)): they not afforded a separate Article of their own.

"In order to attain"

The words *"in order to attain"* in Article 1(2) imply that, considered as objectives, the four freedoms are sub-ordinate or secondary to the primary aim set out in Article 1(1) and that, for the purposes of the EEAA, the significance of each lies in, and only in, its contribution to the attainment of the primary aim (no other status is established for them elsewhere in the Agreement).

The contribution that achievement of each sub-objective makes to the primary aim is, as a matter of economic and commercial realities, necessarily contingent on circumstances. For example, low barriers to capital flows ("free movement of capital") may help in promoting *"a continuous and balanced strengthening of trade and cooperation"* in most circumstances that may arise, but there can nevertheless be situations in which low barriers to capital movements could facilitate the transmission and amplification of economic disturbances and imbalances. Similarly, free movement of persons might in some circumstances lead to de-population of whole regions or countries or to imbalances in the skills mix in regional/ national labour forces in areas subject to out-migration. In the *"ordinary meaning of terms"* (see the VCLT), such effects can reasonably be said to hinder, not assist, achievement of the primary purpose of the EEAA (which refers to "*balanced* strengthening" of trade and economic cooperation).

The text of the EEAA indicates that its drafters and signatories were fully cognizant of these issues: the Agreement explicitly recognises that obligations are, to at least some extent, context-dependent (i.e. contingent on circumstances). When it comes to giving greater specificity to the obligations of the Contracting Parties, the Agreement consistently allows limits to be placed on free movement, provided that those limitations are "justified".

On VCLT principles, any proposed limitation on free movement can be said to be justified if it positively contributes to the Article 1(1) purposes, rather than hinders them. The difficult issues occur when a policy measure – which *ex hypothesi* limits free movement – either has no effect on Article 1(1) purposes or positively harms their pursuit. The question is: would such a measure be in breach of the EEAA?

The broad answer given in the EEAA's Articles is 'not necessarily: it depends on whether or not certain other conditions are satisfied'. The text of the EEAA makes it clear that a limitation is allowable if it serves an identified public purpose (other than the Article 1(1) aim), but that alone may not be sufficient justification. What more might be required is not fully articulated – the EEAA is an incomplete contract after all – but a second condition can be inferred from its appearance at several places in the text. It is a variant of what is more generally called the 'necessity principle or criterion', which is a norm of best practice regulatory policy and competition law. The condition is that any limitation on free movement be such that, among feasibly available policy options, it causes least disturbance to the functioning of the Agreement in achieving the Article 1(1) purposes and does not go wider than is necessary to meet the other policy objectives that motivate it.

The meaning of free movement in general and of free movement of persons in particular

Economic freedom as a general concept is most usually interpreted as referring to the extent to which decisions can be made by individual economic agents (consumers and businesses, buyers and sellers) without direct interference in those decisions by public authority. It therefore comes in degrees, depending on the level of interference.

The EU's four freedoms relate to a sub-set of exchange transactions characterised by the fact that they involve movements (of goods, services, capital and labour) across international

borders and their general purpose is to constrain the ability of national governments to interfere with the individual decisions that cause these movements.

Given this, three important differences between the meaning of the words 'free movement' as they appear in the EU treaties and as they appear in the EEAA can be noted immediately:

- The EEAA seeks a *lesser* degree of freedom of movement than do the EU Treaties: put the other way around, it is less constraining on the ability of national governments to intervene. This can be most easily seen by observing that the Agreement does not establish a customs union. It therefore allows for the existence of customs controls at borders between EU and NEU Contracting Parties, e.g. the border between Norway and Sweden. These controls signify acceptance of greater limitations on the free movement of *goods* than is allowed by the EU Treaties themselves.
- In relation to free movement of persons, the Maastricht Treaty led to a bifurcation, between the EU Treaties on the one hand and the EEAA on the other in the justifiable limitations on such movements that a national government can apply. The source of the bifurcation was the introduction (by the Maastricht Treaty) of the concept of EU citizenship. In its ordinary meaning citizenship might, in line with the free movement Article of the Universal Declaration of Human Rights (which very few people in the UK would disagree with), be expected to imply the right of a person to move around within a territory that is shared with fellow citizens, unhindered by public authority. In effect, the notion of EU citizenship has served to enhance the status of the free movement of persons entailment *in the application of the EU Treaties*. Such movement has become something close to a constitutional right in EU Member States.[6] In contrast, the EEAA does <u>not</u> provide for a common citizenship and free movement of persons remains a sub-objective, subservient to the overarching *economic* purpose set out in Article 1(1). The implications of this for judicial interpretation of the entailments of the *free movement of persons sub-objective* were explicitly recognised at the time of an EEA Joint Committee decision in 2007 incorporating the EU's Freedom of Movement Directive (2004/38/EC) into the EEA Agreement (see the Annex to this paper). In a nutshell, the EEA Joint Committee recognised, very explicitly, that free movement of persons is to be interpreted differently in EU contexts and in EEAA contexts. As indicated, such differentiation in interpretation had already been explicitly recognised in relation to free movement of *goods*.
- In the EEAA context, free movement of persons does not preclude the application of strict limitations on aggregate migration flows by a national government. Rather, the Agreement seeks to restrict the ways in which such an outcome is achieved (see the discussion of the necessity criterion above). Thus, governmental controls on cross-border movements might become problematic when the controls are exercised by *administrative* methods that call for state involvement in *individual* decisions (i.e. a process that is unnecessarily restrictive of economic freedom in its general sense). The alternative to administrative allocation of residency rights is market allocation of such rights, an approach that is normally considered *indispensable* for economic freedom,

[6] See Jean Pisani-Ferry, Norbert Röttgen, André Sapir, Paul Tucker and Guntram B. Wolff, "Europe after Brexit: A proposal for a continental partnership", August 2016, for a discussion of what the authors call "functional" and "constitutional" approaches to the Single Market.

not a restriction of freedom. To illustrate, Chelsea and Kensington might (or might not) be considered a desirable place to reside, but any pressures to in-migration are greatly mitigated by price mechanisms (it is an expensive place to live).

Our own view is therefore that many of today's problems surrounding migration flows are consequences of an inability, thus far, of governments to develop 'best practice' residency policies. That is a *domestic* policy issue, not a defect of the EEAA. Crucially, for NEU states the EEAA puts the matter in the hands of national governments. The EU Contracting Parties may later question and challenge the compatibility with the EEAA of any measures adopted, but the EEAA affords the EU no authority to prevent their adoption. Liechtenstein's immigration policy is a factual illustration of this reality.

Definition of terms (Article 2)

Most treaties and conventions contain an Article setting out the meanings of some of the more important terms that are used in their texts and in the EEAA this is the role performed by Article 2. Two of its paragraphs are of particular significance.

Paragraph 2(b) states that: *"The term "EFTA States" means Iceland, the Principality of Liechtenstein and the Kingdom of Norway."* That is, 'EFTA states' is the collective, referencing label for what we prefer to call the NEU Contracting Parties. It is nothing more than that. References to 'EFTA states' in the later Articles of the EEAA are therefore not to be read as meaning 'member states of EFTA', made most obvious by the absence of Switzerland from the list. Although a small point in and of itself, it is critically important in helping to mitigate 'repetition bias' when reading and interpreting the Agreement.

Post-Brexit, minimalist adjustments to the text of the EEAA would see the UK added to the list at 2(b)[7] and this would not be a completely arbitrary thing to do. The UK was a founding member of EFTA (indeed much the largest of the Association's members at the time) and it could conceivably become a member again in the future. The UK can reasonably be described as an 'historic' EFTA state. Moreover, had the UK not joined the EC in 1973 it might easily have ended up as a NEU Contracting Party to the EEAA (in whatever form the Agreement might have taken in this historical counterfactual) in the early 1990s.

Paragraph 2(c) explains how, for the EEC/EU and its Member States, the term "Contracting Parties" is to be interpreted at any point in the Agreement where it appears. This clarification recognises and serves to address the shared competence issues. In effect, 2(c) says that (i) the words "Contracting Parties" could, in a particular usage, mean the EC/EU, or it could mean the Members States of the EC/EU, or it could mean both the EC/EU and Member States acting together and (ii) which of these is meant is to be deduced from the relevant provisions of the Agreement, i.e. the precise context in which the reference is made, and from the division of competences between the EC/EU and its Member States determined by the EU Treaties. The division of competences within the EU itself continues to be a controversial area and paragraph 2(c) serves to keep any disputes about it under the EU's own roof.

[7] Just as Austria, Finland and Sweden were taken off the list when they acceded to the EU.

There are no ambiguities to be resolved for NEU states: national governments and parliaments are fully responsible for EEAA affairs. There are no shared competence issues to address and hence no reference is made in Article 2(b) to these states.

Other principles in brief (Articles 3-7)

Article 3 says that Contracting Parties should not only take appropriate measures to meet their obligations, but they should also abstain from any measure that would jeopardize the Agreement's objectives and should seek to facilitate co-operation within the framework of the Agreement.

Article 4 is a general obligation not to discriminate on grounds of nationality, without prejudice to specific provisions in the Agreement that may be consistent with discrimination in relevant, identified circumstances. Such non-discrimination is a principle that runs throughout the Agreement

Article 6 requires that, where provisions in the EEAA are identical in substance to provisions in the EC/EU Treaties, their interpretation and application should be in conformity with any case law established by the European Court of Justice *prior to the signing of the Agreement*, i.e. prior to 2 May 1992. This is effectively pre-Maastricht case law of relevance to the operation of the Single Market, which itself was at an early stage of its development in 1992 (the 'rule-book' was much shorter than it is now). The provision is not dissimilar in form to that proposed for the 'Great Repeal Bill' which the Government intends to introduce as part of the Brexit process. Existing EU regulations were initially mapped to the EEAA and subsequent legislation was developed and interpreted via the new rule-making and adjudication procedures set out in the Agreement.

Article 7 adopts the EU distinction between Regulations and Directives for EEAA purposes. There are, however, two major differences between the EC/EU Treaties and the EEAA approaches to these legislative instruments (see later for more detail). First, in the EEAA there is no 'direct effect' of an agreed Regulation: for NEU members <u>all</u> legislative change must be approved by the relevant, national parliament, i.e. 'control' lies with that parliament. Second, the incorporation of both Directives and Regulations into the EEAA must be approved by <u>all</u> (not just a weighted majority) of NEU members, collectively, even before they are sent to national governments and parliaments for consideration. It can also be noted that most EU regulations are, in practice, deemed to be focused on issues that are 'not EEA-relevant' in the first place.[8] The EEAA rule-book, although itself extensive, is considerably shorter than the EU rule-book.

[8] Estimates have varied widely, but a good sight of the balance can be obtained from the work of Dr Richard North, whose estimates lie well clear of both the upper and lower extremes of the range cited during the 2016 referendum campaigns. Counting the number of EU legal acts – Directives, Decisions and Regulations – North has estimated that, for Norway at the end of 2013, there were EEA equivalents in place for around 28% of the EU total. That is, slightly over 70% of the EU's legal acts were not EEA-relevant at that time.

Free movement of goods (Part II, Articles 8 to 27)

This chapter of the Agreement contains provisions to be found more generally in international FTAs. They concern matters such as removal of tariffs and quotas, the establishment of rules of origin[9], and the commodities to be included in the Agreement.

Rules of origin are significant because the EEA Agreement does not establish a customs union among the Contracting Parties: each NEU state can independently determine its own commercial policies in relation to states that are not Contracting Parties (and can also, if it so wishes, unilaterally choose to negotiate membership of the EU customs union).

In the list of commodities covered by the EEAA, the most significant exclusions are food products since the EEA Agreement does not entail participation in the common agricultural or common fisheries policies of the EU.

As in many FTAs, there are provisions for flexibility in performance of obligations, in recognition of the fact that individual Contracting Parties can encounter circumstances in which strict fulfilment of obligations becomes difficult or impossible, for example because of major economic disturbances or imbalances. This flexibility allows agreements to be sustained in circumstances where, with more rigid provisions, they might collapse completely.

To illustrate, having established general provisions to prevent national recourse to customs duties (tariffs) and quantitative restrictions on trade flows (quotas) in Articles 11 and 12, Article 13 goes on to say that:

"The provisions of Articles 11 and 12 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."

In short, what is required is a good faith commitment to non-discriminatory practices and to removal of barriers to trade, not unbending adherence to an agreed set of specific provisions.

[9] Where states engage in trade with other countries not covered by a FTA and have different tariff structures in relation to exports to and imports from those other countries, there is obvious scope for one of more of the tariff structures to be bypassed. Thus, if A and B sign a FTA and A has lower import tariffs than B for goods imported from country C, exporters in C might seek to reduce tariffs to B by routing goods through A. Rules of origin seeks to hinder this type of commodity arbitrage.

Free movement of persons, services and capital (Part III, Articles 28 to 52)

Free movement of persons/workers

Article 28, which covers free movement of *workers* (not persons) lies at the heart of current Brexit issues. It first specifies that freedom of movement entails that there be no discrimination based on EEA nationality in relation to employment, pay, and other conditions of work and employment (Article 28(2)). More specifically, Article 28(3) entails rights of workers: to accept offers of employment made; to move freely within the EEA for that purpose and stay in an EEA state for employment purposes; and to remain in an EEA State after being employed there. These entailments are then immediately limited (in Article 28(4)) by dis-applying them to employment in public service. Clearly, the EEAA's signatories thought that free movement of workers could be 'too free'.

This last point is confirmed by a more general limitation on the scope of the specific entailments of Article 28(3). The entailments just listed are prefaced, at the opening of the paragraph, by:

"It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: …"

Public policy is a very broad ground for limiting the free movement of workers since governments pursue a wide range of economic and social policies. On a very narrow textual interpretation, almost anything could justify restrictions of free movement of workers (a point that is often missed by at least some lawyers who favour narrow, textual interpretation of other Articles).

The substantive force of the Agreement, however, comes principally from its primary objective (Article 1(1)). As already discussed, in considering the effects of restrictions on free movement of persons/workers in the name of public policy, it is necessary to pay careful attention to the potential effects that any proposed limitations might have on the ability to attain the Article 1(1) objective.

The earlier discussion indicated that a national immigration or residency policy that satisfied the 'necessity criterion' would be compatible with the EEAA. On the other hand, what could be problematic are policies with the following characteristics:

- Discrimination among EEA workers based on nationality.
- Discrimination based on the type of labour involved, since this could imply a form of 'manpower planning' by central government that is capable of distorting trade flows.
- Provisions that restrict individual residency decisions beyond what is necessary to achieve the objectives of an immigration or residency policy.

Even these characteristics would not necessarily be incompatible with the EEAA, however, as the example of Liechtenstein indicates (its current residency policy arguably exhibits all three). One reason for this is, as will be seen later, that the governance structure of the EEAA affords significant 'hold-out' powers to NEU states.

In short, what Article 28 serves to hinder are national immigration/residency policies that are not in conformity with norms of best policy practice, not national immigration/residency policies *per se*.

Article 29 is the other major provision in relation to free movement of persons/workers. It provides for employees from another EEA state to have access to the social security system of the host state. Social security policy itself is a matter for individual states, but Annex VI of the EEAA, which is explicitly referenced in Article 29, contains provisions based on an EC Regulation (883/2004/EC) that seek greater social security co-ordination. Significant parts of Annex VI are devoted to adaptations of that Regulation to reflect the arrangements in place in individual NEU states. The Annex therefore serves as a useful source of illustrations of the fact that EU Regulations are not necessarily mapped, unadjusted, into the EEAA.

Right of establishment

Articles 31-35 establish rights to set up businesses across the EEA, including businesses of those who are self-employed. As is the case for the free movement of workers provisions, the rights of establishment are subject to limitations warranted/justified on grounds of public policy, public security and public health (Article 33).

Services

These comments can be repeated in relation to freedom to provide services across the EEA, which is covered by Articles 36 to 39. The possibility that limitations on free movement can be imposed is established by Article 39, which simply refers back to the provisions of Article 33 in the rights of establishment section of the Agreement.

The only further point to note is that limitations on these rights are, as a matter of observation, extensively imposed by individual EEA Contracting Parties. The relevant sub-objective, free movement of services, can safely be said to be well short of being even approximately attained (although slow progress continues to be made). In this area, the interests of the UK lie generally in promoting further and faster directional movements toward greater freedom of movement. The loss of UK participation in the EEAA's rule-making process would therefore likely hinder progress in achieving the Article 1(1) aim for all Contracting Parties and be particularly harmful for the UK itself (other EU governments with more protectionist inclinations might, of course, welcome such hindering of progress in reducing barriers to trade in services).

Capital (Articles 40-45)

The free movement of capital provisions of the EEAA repeat the stress on non-discrimination on grounds of nationality contained in earlier provisions, but the 'public policy, public security and public health' over-ride is not explicitly mentioned in this sub-set of Articles. Instead, there is greater specificity about the grounds that might warrant restrictions on capital flows. These are: capital market disturbances, severe balance of payments difficulties, distortions of competition and illegal evasion of national rules and regulations.

The last of these is, however, an implicit recognition of the more general public policy criterion, since it affords priority to national rules and regulations over considerations of free movement, provided only that any limitations satisfy the condition that the national rules and regulations do not discriminate between nationals of the Contracting Parties.

Article 45(4) is of particular interest because, although specific to capital movement, it is the first, unambiguous reliance in the text on the 'necessity criterion'. Article 45(4) states that, when measures are taken to address balance of payments crises they must *"... cause the least possible disturbance in the functioning of this Agreement and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen."* Later applications of the criterion, using very similar wording, are to be found in Articles 64(1), 112(2), 113(3), and 114(1).

Other matters (Articles 46-52)

This Part of the Agreement ends with two chapters on Economic and Monetary Policy Cooperation and on Transport. The former comprises one paragraph concerned with information exchange and discussion, the latter re-states a more general principle: the transport policies of a Contracting Party should not discriminate on grounds of nationality.

Competition and Other Common Rules (Part IV, Articles 53 to 65)

Competition Law (Articles 53 to 60)

The competition law sub-set of Articles maps what have been the general provisions of European Treaties since the Treaty of Rome into the EEA Agreement. Historically the UK has been a supporter of the relevant provisions (which are viewed less benignly by some of the other Contracting Parties) and has tended to favour their strong enforcement. They are highly compatible with domestic UK competition law.

State Aid and other common rules (Articles 61 to 65)

The same comment can be repeated in relation to the State Aid provisions, but there are a further three points that might also be noted.

- Monitoring and adjudication of state aid issues lies with different sets of institutions for the two sub-sets of Contracting Parties, EU and NEU (see further below). Specifically, the authority of the European Commission and the jurisdiction of the European Court of Justice does not extend to the NEU members of the EEAA.
- Although the state aid provisions are opposed by some strands of socialist thinking, in practice they allow significant state aid to be provided in a wide variety of circumstances. In short, they constrain rather than prohibit. The simplest illustration of this lies in the fact that the potentially quite massive state aid for the Hinkley Point nuclear power station was considered allowable under existing EU arrangements.
- Linked to the fact that the NEU states are not subject to European Commission or ECJ authority, the state aid provisions of the EEAA could potentially impose *greater*

constraints on a post-Brexit UK government than is currently the case. This follows from the more narrowly economic objective of the EEAA, which eliminates from consideration some of the political trade-offs that might be weighted more heavily by the European Commission, supported by the ECJ, in its pursuit of a wider set of purposes (Hinkley Point being a possible example). It is an open question as to how significant such a tendency might be, since it is counteracted by facts that (a) the state aid provisions of the EEAA are taken from the pre-Maastricht rule-book and (b) there has to date been no post-Maastricht 'bifurcation' in interpretation of the sort that has occurred in relation to free movement of persons.

Horizontal provisions relating to the four freedoms (Part V, Articles 66 to 77)

Notwithstanding the reference to the four freedoms in its title, this part of the EEAA is concerned with the more mundane task of promoting harmonisation of market rules. Given that a market, any market, is a set of rules that is collectively shared by participants, and given that the overarching purpose of such rules is to facilitate exchange transactions (i.e. reduce the costs of trading), such harmonisation is a ubiquitous tendency whenever multiple parties seek to trade on a regular basis with one another. It is therefore a global phenomenon and the EEAA is distinguished only by the fact that that it seeks a deeper level of harmonisaton, and hence seeks lower barriers to trade, than most multilateral agreements.

Part V of the Agreement provides for harmonisation in those parts of rule-making that have relatively direct implications for the functioning of goods, services and labour markets. The areas covered are 'social policy' (encompassing working conditions, labour law and equal pay), consumer protection, environment, statistics and company law.

Here as elsewhere the fine detail is contained in Annexes to the EEAA, which typically contain lists of relevant EC/EU Directives and Regulations and the modifications to them required for EEA purposes. The references made in this sub-set of Articles are to Annex XVIII.

EC Directives tend to be of general nature and are not directly applicable at EU Member State level or *a fortiori* at NEU state level: national legislation is required to reflect their principles. Since general principles tend to command support more easily than the finer detail of legislation, straightforward acceptance of a Directive is usually unproblematic, provided only that it is deemed 'EEA-relevant'. Adaptations can be made at the national level, subject to normal, national processes of parliamentary scrutiny.

When they (Directives) are incorporated into the EEA 'rule-book', significant, accompanying amendments, qualifications, or commentaries therefore tend to be relatively infrequent, occurring only when major issues of principle are at stake, as was the case in relation to incorporation of Directive 2004/38/EC on free movement of persons (see above and Annex).

In contrast, both because of their greater specificity and the fact that they must later be acceptable to all NEU governments and parliaments (a consequence of there being no 'direct effect'), proposed EU Regulations are more likely than Directives to be subject to significant

amendment at the EEAA incorporation stage, as indicated in the Annexes to the Agreement. Pre-knowledge of the later, 'NUE acceptability' constraints itself has influence on the earlier drafting of EU Regulations.

Cooperation outside the four freedoms (Part VI, Articles 78 to 88).

Part VI of the Agreement is concerned with strengthening cooperation among the Contracting Parties across a range of policy areas that have more indirect implications for the functioning of the Single Market. The areas explicitly mentioned (at Article 78) are: research and technological development; information services; the environment; education, training and youth; social policy; consumer protection; small and medium-sized enterprises; tourism; the audiovisual sector; and civil protection.

A range of different forms of cooperation are listed in Article 80, from information exchange to the development of parallel legislation. Perhaps the most significant for policy purposes is participation in common programmes and projects involving significant expenditures on the relevant activities, e.g. collaborative research and development programmes.

Participation in these programmes is a matter of choice for NEU states, but the decisions are usually taken collectively (see further below for an outline of the EEEA's decision making processes), with the possibility of opt-outs for individual states. The latter are naturally discouraged, but, by virtue of the governance structure of the EEAA, they cannot ultimately be resisted when questions of participation in a new programme arise. In contrast, once an EU decision has been made to establish a new programme, participation is mandatory for EU Member States.

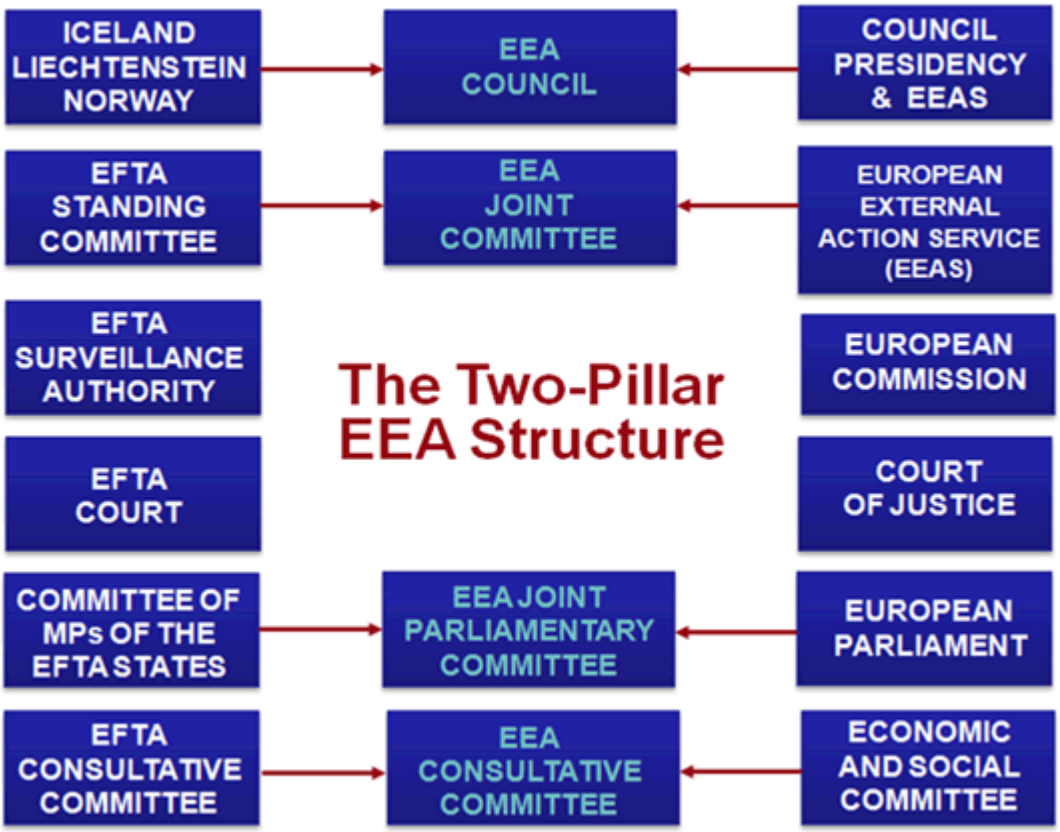
The Agreement sets out (in Article 82) the rules for the determination of hypothecated budget contributions to the various co-operative activities, which are based on the GDPs of the participating states. There can be a certain degree of confusion about these arrangements in public debate: the notion of 'budget contributions' can convey the impression that NEU states pay over sums of money to the EU which the latter can then allocate as it wishes. The position is rather that the parliaments of the NEU states decide whether or not to join a programme, following their own evaluations of the perceived benefits and costs of participation. The funding contributions are determined formulaically in ways that are specified in Protocol 32 of the EEAA. As is true more generally, NEU states do not surrender unfettered discretions on budgetary matters in the ways that EU Member States are required to do.

Institutional provisions (Part VII, Articles 89 to 114)

The Institutional Provisions Part of the Agreement is of considerable importance for the EEAA's operation and it is another frequently misunderstood aspect of the arrangements.

Complex international agreements typically involve the development of lengthy sets of rules, and ensuring implementation of and compliance with those rules calls for systems of monitoring, enforcement and adjudication, whether via judicial supervision or quasi-judicial dispute resolution procedures: see for example the provisions of the recently concluded, enhanced trade agreement between the EU and Canada. These supra-national institutional developments can, however, be politically contentious, as witnessed by the controversies surrounding this aspect of the proposed Transatlantic Trade and Investment Partnership between the EU and the USA (TTIP). Monitoring and adjudication arrangements for the many bilateral agreements between Switzerland and the EU have also been a source of considerable disagreement and difficulty.

In relation to the EEA Agreement, the NEU states were, at the outset, unwilling to accept the authority of the EU supra-national bodies (i.e. of the European Commission and the European Court of Justice) and hence the Agreement establishes a two-pillar governance structure, summarised in the diagram below, taken from the EFTA website.[10]



[10] The EEAS is the European External Action Service, i.e. the EU's diplomatic service.

A number points that are not immediately apparent from the diagram, but which are set out in some detail in Part VII of the EEAA, can be noted:

- The NEU institutional pillar operates on a consensual basis. Under the provisions of the Agreement the NEU states must "speak with one voice" (Article 93(2)). There is therefore no equivalent to the majority voting arrangements embodied in the EU Treaty. For an individual NEU state this provision is a potential source of 'hold-out' power, which mitigates unwanted effects that might arise for want of voting rights when Directives and Regulations are adopted by the EU, for its own purposes.
- The NEU states participate in the preparation of new EU legislation that may be of 'EEA relevance', i.e. that may affect the functioning of the Agreement. As indicated earlier, most EU regulations are not 'EEA relevant', because the overarching aims of the EEAA are much narrower than those of the EU Treaties, e.g. the EEAA does not encompass the Common Agricultural and Fisheries Policies or a Common Citizenship.
- The NEU states have not, in becoming Contracting Parties, transferred <u>any</u> legislative competences to the joint EEAA bodies or *a fortiori* to the EU institutions. Thus, for example, if NEU suggestions concerning the shape of a new EU Regulation in its preparatory stage are rejected, the same Regulation still must be considered again before it can be incorporated into the EEA Agreement. In the first instance, this is a matter for the EEA Joint Committee and Council, but ultimately it is a matter for NEU state parliaments (since there is no 'direct effect'). Of necessity, new rules must be acceptable in both pillars of the governance structure.
- In the event of a failure to agree about the form of amendments to the EEAA – which principally take the form of amendments to the Annexes that incorporate Directives and Regulations – the EEAA makes specific reference to the possibility of recourse to the notion of *equivalence* (Article 102(4)). Equivalence is a concept that has come to play an increasingly important role in international commercial agreements at the global level, including in sectors such as food and financial services. In effect, it amounts to mutual recognition of the differing rule-books of different parties when those alternative sets of rules are sufficiently similar in their purposes and effects for each rule-book to be acceptable to the other party or parties.

Fax diplomacy

Given these points it is apparent that what some Norwegians have called 'fax diplomacy' – a process characterised by mechanistic transcription of EU legislation into the EEA Agreement, without influence on that legislation – is by no means intended by, or *de facto* inherent in, the EEAA itself: the Agreement creates a capacity for significant rule-making influence and power to be exercised by NEU states. This capacity has at least three dimensions:

- Participation in the preparation of 'EEA-relevant' EU legislation.
- The hold-out power conferred by the 'one voice' aspect of the governance structure, ultimately underpinned by the ability of sovereign parliaments to reject any proposed EEA legislation.
- Where Regulations are concerned with rule-harmonisation in a particular field of activity in which a global institution is also at work, NEU states have the advantage of possessing an individual/national seat at both (EEA and global) tables. They can

therefore influence EEA rule-making indirectly, via their individual voice at the global table, since global rule-making itself affects EU rules, arguably to an increasing extent.

Although NEU states sometimes complain about their lack of influence on Single Market rules and have tended to attribute it to (i.e. blame) the provisions of the EEAA, these points indicate that the attribution cannot be taken at face value. We conjecture that the root causes of any 'fax diplomacy' that might exist lie rather in the current, highly unbalanced distribution of administrative resources between the two pillars of the EEAA's governance structure. A multilateral international agreement like the EEAA tends to involve the development and operation of extensive and complex rule books and full participation in the rule-making processes can be beyond the administrative resources realistically available to smaller states. (The problem is familiar in domestic regulation, where a common remedy is to exempt small businesses from parts of a market rule-book in order not to encumber them with too much red tape.) However, any existing imbalance in resources between the two governance pillars of the EEAA would be very substantially reduced, if the UK acceded to the NEU pillar. The past is, therefore, unlikely be a reliable guide to the future in this respect.

Safeguard measures

As elsewhere in the Agreement, in addition to setting out provisions geared toward the attainment of the primary objective, Part VII of the Agreement addresses the conduct of Contracting Parties when there are disturbances in economic and social circumstances that might put the Agreement at more general risk. These are contained in a Chapter on Safeguard Measures (Articles 112 to 114).

Article 112 states that a Contracting Party may "*unilaterally"* take appropriate measures to address *"serious economic, societal or environmental difficulties of a sectoral or regional nature"* that arise and are considered liable to persist. However, Article 113(3), which is concerned with procedural matters, goes on to say that *"For the Community, the safeguard measures shall be taken by the European Commission"*.

This is an example of an instance where, consistent with Article 2(c), the term "Contracting Party" is to be interpreted to refer to the EC, not to a Member State of the EU. Strictly speaking, the clarificatory statement *"For the Community …"*, which the typographical layout suggests might have been a late addition to the text, is not necessary: Article 2(c) is sufficient. Its appearance might suggest that there were intra-EU, shared competence disputes in play at the time of the construction of the Agreement.

The position then is that each of the NEU states can act unilaterally, as can the European Commission, but individual Member States of the EU cannot. Thus, unilateral resort to such measures is not possible whilst the UK is an 'EU member' of the EEAA, but it would become possible as a 'NEU member'. For example, had the UK been a NEU member of the Single Market and had he so wished, Prime Minister Cameron would have been able unilaterally to impose an emergency brake on immigration: there would have been no need to seek prior agreement from other EU leaders.

That said, it is clear from the text of the EEAA that the Safeguard Measures are intended as a temporary form of flexibility: they are hedged around with checks and balances to discourage over-easy resort to them. As discussed above, flexibility is built into earlier sections of the Agreement, for example in the form of limitations on the free movement entailments of the Agreement which can be justified on grounds of public policy. The checks and balances in the Safeguard Measures section of the EEAA are focused on problems to which some urgent and immediate response may be appropriate. In such circumstances, the risks of ill-considered responses tend to be higher. Roughly speaking, the EEEA's message to NEU Contracting Parties and (and to the European Commission) might be read as saying "don't use the Safeguard Measures option as a politically expedient substitute for better-developed policies that could address the underlying policy problems."

Financial Mechanism (Part VIII, Articles 115-117)

The Financial Mechanism provides for resource transfers by NEU Contracting Parties to support economic development in less affluent EEA states, with the objective of reducing economic and social disparities across the EEA. The rationale for the provisions flows directly from the primary objective at Article 1(1), and in particular from its references to a *balanced* strengthening of trade and economic relations and to a *homogeneous* economic area. It is also underpinned by one of the Recitals in the Premamble: *"AIMING to promote a harmonious development of the European Economic Area and convinced of the need to contribute through the application of this Agreement to the reduction of economic and social regional disparities."*

The financial contributions are subject to discussion and agreement from time to time (present commitments run to 2021, in line with the EU budgetary planning timetable) and are specified in Protocol 38 of the Agreement. As is the case for NEU state participation in specific, EU-initiated programmes, they are often referred to as EU budget contributions. However, the relevant programmes supported by the financial contributions are developed, administered, and operated directly by the NEU states themselves, in conjunction with the beneficiaries. Speaking broadly, they are owned and controlled by the NEU states and they bear much greater resemblance to direct international aid than to any notion of 'payments for access to the Single Market'. As is sometimes the case for international aid more generally, there can be some entanglement with global security issues. Hence the programmes can realistically be seen by individual NEU states as multi-purpose exercises, not confined to the single purpose specifically identified in Article 1(1) of the EEAA.

The relevant programmes and financing are agreed and operated collectively by the NEU states, consistent with the consensual, 'one voice' provisions of Part VII of the EEAA. However, Norway wished, of its own volition, to provide greater financial support for this type of programme. As well as the EEA payments, therefore, it has made additional 'Norway payments' on a unilateral basis.

These points are relevant to discussion of the 'Norway Option' in public debates about Brexit, where Norwegian 'budget contributions' have been used as a benchmark in assessing the

financial entailments of UK membership of the EEAA post Brexit. It is important to note, therefore, that the Norwegian numbers comprise four elements:

- Payments associated with NEU state participation in specific European *programmes* and projects, financed by ear-marked contributions and decided in the light of the perceived, consequential benefits and costs of participation. An oft cited example, because of its scale (and possibly because the UK is a major beneficiary), is Horizon 2020, a collective research and innovation programme aimed at improving Europe's competitiveness in international markets.
- Expenditures associated with programmes run by the NEU states themselves (not by the EU) to promote economic and social development in less prosperous EEA states, in compliance with the Financial Mechanism provisions of the Agreement.
- The voluntary Norway payments, which currently account for around 45% of all Financial Mechanism payments made by that country.
- Payments for the administrative functions undertaken by the EFTA secretariat in relation to the operation of the EEAA – and it is at this administrative-support level that the European Free Trade Association is, as an organisation, relied upon by the NEU states – and as *pro rata* contributions to administrative costs incurred by the European Commission for EEAA purposes, covering such things as provision of office space, meeting costs, etc.

The last of these elements is very small relative to the others.

General and final provisions (Part IX, Articles 118 to 129)

The final part of the Agreement is chiefly concerned with tying up loose ends, but it contains several Articles whose interpretation (usually misinterpretation) has featured prominently in Brexit discourse.

Article 118

Article 118 provides for the possibility of developing the EEAA to incorporate provisions of a more political nature, which is a direction of travel consistently sought by the EU and consistently resisted by the NEU states. Since the unanimous consent of the NEU states is required for this to occur, these states unambiguously hold the decisive cards in this arena.

Article 126

Article 126 addresses issues raised by special Member State territories such as the enclaves of Ceuta and Melilla (Spain), the Isle of Man and Channel Islands (UK), the Faroe Islands (Denmark), the Åland Islands (Finland), French overseas territories, and so on. In the absence of Art 126, Article 29 of the VCLT, dealing with the Territorial Scope of Treaties, would apply: *"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."* Some of the EEA's Contracting Parties wished to make different arrangements for politically distinctive parts of their "entire territory" and Article 126 is the vehicle for achieving that end.

Most of these sought-after special provisions were settled for EU Member States in the course of their accession to EU. Hence the first (short) paragraph of Article 126 refers simply to the Agreement applying to territories to which the EC/EU Treaty applies, and "*under the conditions applied in those Treaties"*. Some lawyers, taking the text out of context, have interpreted this to mean that Article 126 is determinative of Contracting Party status, but that was not the original intention in the drafting of the Agreement and neither the textual context (e.g. over 80% of the text in Article 126 is concerned with the Åland Islands, which lie in the Baltic Sea) nor the object and purposes of the EEAA support that interpretation, which runs counter to the VCLT's principles. The loss of Contracting Party status by the UK would manifestly harm, not promote, the strengthening of trade (the Article 1(1) purpose), not only with the EU and its Member States, but also with Iceland, Liechtenstein and Norway and any ambiguities should properly be resolved purposively, to promote, not undermine, the stated aims (and original intentions) of the Agreement. A narrow interpretation would, in effect, seek to exploit a potential ambiguity to create a 'backdoor' means of withdrawal from the EEAA – one that would shut the existing NEU states out of the process and would, in effect, be an abdication of responsibilities to these states.

Others have argued that, post Brexit, the UK would remain a Contracting Party, but that such status would be an "empty vessel" because the EEAA would no longer apply to UK territories. It is obviously true that, post Brexit, an un-amended Article 126(1) would not specifically mention UK territories, but, as a Contracting Party to the EEAA, Article 29 of the VCLT (see above) would still apply. That is, there is a burden of proof to be discharged in order to claim that the EEAA would not apply to the territories of one of its own Contracting Parties (which, on the face of it, is a very odd claim to make): 'emptiness' cannot simply be assumed.

The simple fact of the matter is that the change in circumstances caused by Brexit calls for a technical, textual amendment to reflect new realities. To resist such a minor drafting change would itself be a breach of good faith participation in the EEAA (i.e. be in violation of the VCLT) – it would be contrary to the EEAA's Article 1(1) aim (trade between Contracting Parties would be harmed), would possibly be in breach of Article 3 of the EEAA, and would be in flat contradiction to the pragmatic, expedient approaches taken to the similarly simple textual amendments required when Austria, Finland and Sweden acceded to the EU or when the EEC became the EC for EEAA purposes. For these reasons, we do not think it would be conduct that would be adopted by the EU, although it is just possible that the EU might be content not to seek to challenge such 'legal opportunism', if initiated by the UK (the EU would then largely escape the reputational damage that frequently accompanies opportunistic conduct). Whether the NEU states might seek compensation if such an interpretation is relied upon in the Brexit process is a question we leave for others.

Article 127

These points are reinforced by the fact that the EEAA contains explicit, unambiguous provisions regarding the attainment and forfeiture of Contracting Party status. In relation to withdrawal, Article 29 of the VCLT says that: *"The termination of a treaty or the withdrawal of a party make take place: (a) In conformity with the provisions of the treaty; of (b) At any*

time by consent of all the parties after consultation with the other contracting States." Article 127 of the EEAA is an explicit provision for withdrawal of a Contracting Party from the Agreement. It establishes an expedient means of withdrawal as an alternative to seeking the consent of all the parties, which in the case of the EEAA means Iceland, Liechtenstein and Norway, as well as the EU and its Member States.

If anything, Article 127 might be viewed as making exit from the EEAA too easy: the UK can withdraw from a deep trade and cooperation agreement without much ado, notwithstanding the high importance of the UK market for Icelandic and Norwegian interests. Irrespective of questions about legality, to seek to exit the Agreement by some easier means still would, in our view, lack propriety.

Article 128

Article 128 deals with issues of accession to the Agreement. Some commentators have interpreted it to mean that, having left the EU, the UK would have to become a member of EFTA to accede to the Agreement, but that matter is moot since the UK is already a Contracting Party to the EEAA. Only if the UK first withdrew from the EEAA, via Article 127, and then reapplied to become a Contracting Party would any ambiguities in the interpretation of Article 128 need to be addressed. If that chain of events did eventuate, it would then simply be a matter of the UK applying for readmission and 'black letter' legal interpretation would almost certainly not be a constraining factor in any decision (see the earlier comment on past consideration of membership for Turkey and for Central and East European states).

Article 128 explains how a new Member State of the EU becomes a Contracting Party to the EEA: It *"… shall … apply to become a party to this Agreement. It shall address its application to the EEA Council"* (Article 128(1)) and *"The terms and conditions for such participation shall be the subject of an agreement between the Contracting Parties and the applicant State. That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures"* (Article 128(2)*).* Iceland, Liechtenstein and Norway therefore need to give their consent, as well as the EU and its Member States.

There is clearly no automatic, legal linkage here between EU membership and EEAA Contracting Party status on accession to the EU and, for example, Croatia acceded to the EU significantly in advance of becoming a member of the EEA. Given that international law does its best to try to support and maintain existing international agreements – which can be precious things in a fissiparous world – *a fortiori* there is no reason to suppose that a legally automatic, consequence-free withdrawal processes is available to the UK Government.

Concluding thoughts in relation to Brexit

The UK is a Contracting Party to the EEA Agreement and there is nothing in the Agreement's provisions that convincingly serves to establish that the UK will cease to be so on withdrawal from the Treaty of Lisbon. The significance of this fact is difficult to overstate. The Agreement does not just confer rights on the Contracting Parties, it also establishes good faith obligations.

Opportunistic attempts to evade proper process on the basis of specious interpretations of text stripped from context would amount to a dereliction of these obligations. Thus, the impending choice for the UK Government is whether to:

- Give Article 127 notice to withdraw from the EEAA on Brexit Day, or
- Continue as a Contracting Party for a definite or indefinite period beyond Brexit Day.

The notice period for Article 127 indicates that this is a decision required not later than one year after the date of Article 50 Notification of Withdrawal from the EU Treaties. If the latter option is selected, good faith requires that the UK should clarify its intentions to other Contracting Parties when that decision is taken, not least to allow time for discussions to proceed on technical amendments required to bring the EEAA's text into alignment with the new circumstances, ready for the day after Brexit, and, more substantively, to address the governance issues arising from a shift of the UK to non-EU status.

In relation to the paradoxical conjunction with which we started – a professed commitment to free trade coupled with simultaneous signalling of an intention to abandon a free trade agreement of great economic significance – our conclusion is that there has indeed been considerable misunderstanding of the nature and implications of the EEAA.

Misinterpretations of the EEAA serve, we think, to give rise to and/or to sustain a false dichotomy: they suggest that there is a necessary choice between *either* membership of the Single Market *or* acquisition of capacities to pursue free trade agreements on a global basis and to limit/control inward migration flows. Whether this is intentional or unintentional is not relevant for our basic point, which is simply that being a Contracting Party to the EEAA is consistent with the existence and exercise of the latter two capacities. It is abundantly clear, for example, that the EEAA does not preclude UK pursuit of a global commercial agenda. The Agreement even goes so far as to highlight that point in its Recitals: it is placed right in front of the nose of the reader, even before the beginning of the substantive Articles themselves.

The specific, free movement of persons entailments of the EEAA are a little further out in front of the nose, but still in plain sight, and differences between the EU Treaties and the EEAA were highlighted in the EEA Joint Committee Declaration set out in the Annex below. Perhaps the most serious misunderstanding is to believe that the EEAA would, somehow or other, allow the EU to determine what the UK can and can't do in the field of immigration policy. It doesn't do that: post Brexit, the EEAA would provide neither the European Commission nor the ECJ with any such authority. Nor does the EEAA simply re-establish that authority within its NEU governance pillar. The NEU pillar operates with rather different principles and procedures which, by conscious design, are deferential to considerations of national sovereignty.

Looking forward to the post-Brexit period, it appears to us that EEAA Contracting Party status would be consistent with achieving outcomes that would meet all the major concerns of most of those who voted Leave in the Referendum. Any claimed necessity for politicians to make a dichotomous choice cannot therefore reasonably be attributed to an electoral mandate. No such mandate exists and nor can it reasonably be inferred from the answers given to the specific question that was put to voters in the referendum: as outlined above, there are very major

differences between the EEAA and the EU Treaties in their implications for UK economic policies and *a fortiori* for other strands of UK public policy.

If the UK does end up withdrawing from the EEAA because Government and Parliament are convinced that a better 'access' agreement can be substituted for it, that would be fully understandable – although it would, for obvious reasons, be advisable to have the alternative firmly in hand before serving Article 127 notice. If, on the other hand, UK withdrawal was largely consequential on easy-to-correct misunderstandings, that would be hapless at best, but, if wilful ignorance or deceit was also involved, an appropriate judgment might be significantly harsher.

Annex

DECISION OF THE EEA JOINT COMMITTEE

No 158/2007

of 7 December 2007

amending Annex V (Free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement

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Joint Declaration by the Contracting Parties to Decision of the EEA Joint Committee No 158/2007 incorporating Directive 2004/38/EC of the European Parliament and of the Council into the Agreement

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.