THE EEA AGREEMENT: WHAT IS IT AND HOW DOES IT RELATE TO BREXIT?

What is the EEA Agreement?

The EEA Agreement is an international treaty entered into by the "*Contracting Parties*". These are listed in the Agreement as the EU, each Member State of the EU in its own right (including the United Kingdom), and Norway, Iceland and Liechtenstein. The EEA Agreement was entered into on 1st January 1994. It underpins the "single market", which has 500 million consumers, accounts for 44% of UK exports and 57% of UK imports, and whose members generate 25% of global GDP.

The EEA is an entirely separate agreement from the EU Treaties. Like the EU Treaties, it provides for a single market with free movement of workers, capital, goods and services. It also provides for EU rules in those areas as they are developed to be incorporated into the EEA arrangements. There are, however, some fundamental differences:

1. Unlike the EU, there is no concept of "EEA citizenship". The EEA is an agreement designed to achieve economic rather than political objectives.

2. Unlike EU law, EEA law does not have direct effect but has to be incorporated into national legislation in accordance with each state's national constitutional requirements.

3. There is a "safeguard clause" in Article 112 allowing States to suspend their obligations for economic and social reasons In particular, Article 112 would permit a non-EU member of the EEA to impose certain measures to limit excessive migration which was causing economic or social difficulties. Indeed Liechtenstein has done so and this is a precedent the UK could follow.

4. The EEA Agreement is limited to economic and trade matters and does not cover many other areas that have become subject to EU law (for example, agriculture, fisheries, the common commercial policy, VAT, justice and home affairs).

What advantages does membership of the EEA give?

Individuals and companies have economic rights under the EEA Agreement that must be protected by the courts of all EEA Member States. So, for example, a Norwegian company seeking to set up business or sell goods in the UK, or a UK citizen taking up a job offer in Iceland, is entitled to rely on EEA rules in a national court.

How are EEA rules drawn-up?

The rules (directives and regulations) underpinning the EEA focus primarily on the efficient functioning of the single market rather than political or social matters. For the most part the rules originate from the EU, but the non-EU EEA States have considerable influence in shaping them. No EU legislation is "imposed" on non-EU EEA States. The final decision on whether rules are to be implemented is made by the EEA Joint Committee which comprises the EU and the non-EU EEA states. Decisions are taken on the basis of unanimity, which means *in extremis* a non-EU EEA State could veto proposed rules (as Norway has done).

How are disputes resolved?

The Court of Justice of the European Union (CJEU) (formerly the European Court of Justice) has no jurisdiction over EEA member states that are not members of the EU. There is a separate court – the EFTA Court – that issues advisory opinions on questions of law when asked to do so by the courts of those states. This is to be contrasted with the CJEU which issues binding decisions. The EFTA Court operates in English, and its judgments are generally regarded as better-reasoned, less inclined to expand the scope of supranational law, and more respectful of national sovereignty, than

those of the CJEU. It generally decides cases much faster than the CJEU. The EFTA Court will, on single market questions, generally follow the CJEU's pre-existing decisions on the meaning of single market rules, in order to maintain consistency of approach, but where there is no pre-existing decision the EFTA Court may develop its own approach. In any event, any comprehensive trade agreement between the UK and EU will require consistency of approach in order to maintain common regulatory standards for traded goods and services and a tribunal of some kind to adjudicate on disagreements and to clarify ambiguities.

There is also an EFTA Surveillance Authority that deals with competition, state aid and certain other matters. Its decisions may be appealed to the EFTA Court.

Is the EEA Agreement part of UK law?
Yes. The EEA Agreement Act 1993 added the EEA Agreement to the list of Treaties incorporated into UK law by the European Communities Act.

What is the UK Government's position on the EEA Agreement in the context of Brexit?
The Government has stated that it wants the United Kingdom to leave the single market and that it does not want an "*off-the-shelf*" arrangement. In the recent judicial review proceedings brought by Peter Wilding and Adrian Yalland ("the EEA Judicial Review") the Government eventually accepted that its aspirations in this respect were inconsistent with membership of the EEA Agreement (but see below).

Is leaving the EEA Agreement a separate decision from leaving the EU?
Yes. In legal terms, the question here is what effect withdrawing from the EU under Article 50 of the Treaty on the EU has on the United Kingdom's rights and obligations under the separate EEA Agreement.

In December 2016, the UK Government suggested that leaving the EU under Article 50 "automatically" terminated the United Kingdom's membership of the EEA. However, when challenged on its position in the EEA Judicial Review, the Government abandoned it and latterly stated that, after leaving the EU, the United Kingdom's position in the EEA would be "*unworkable*". It is not entirely clear what it meant by that and the Government has not clarified its position.

There are, however, some basic principles of international law that strongly suggest that the United Kingdom could not escape its obligations under the EEA Agreement merely by leaving the EU.

The United Kingdom is a separate "*Contracting Party*" to the EEA Agreement in its own right: so it is bound, in its own right, by the EEA Agreement. It owes obligations under the EEA Agreement to States that are not members of the EU (Norway, Iceland and Liechtenstein), and since it is a basic principle of international law that States are not affected by Treaties to which they are not party, it is impossible to see how the rights of those States (and the rights of their citizens) could be affected by action under the EU Treaties.

It is true that there is a specific provision in the EEA Agreement (Article 2(c)) that, for EU Member States, allocates rights and obligations under the EEA Agreement as between the EU and its Member States: but that provision does not suggest that an EU Member State leaving the EU ceases automatically to have any rights or obligations under the EEA Agreement. Further, although some provisions of the EEA Agreement refer to "*EC Member States and EFTA States*", many other provisions which impose obligations on States (such as the free movement of goods provisions) refer to "*Contracting Parties*" (i.e. States contracting in their own right).

Some commentators have pointed to the fact that Article 126(1) refers to the territory covered by the EEA Agreement as being the "*territories*" to which the EU Treaties apply (in addition to Norway,

Iceland and Liechtenstein). Indeed, this was the Government's initial position prior to the commencement of the EEA Judicial Review. However, the Government then abandoned this position and finally accepted that Article 126 did not "*giv[e] rise to termination of the EEA Agreement* ipso jure*"*. In fact, if the intent of Article 126 were to limit the Agreement only to states which are at any time member states of the EU (and Norway, Iceland and Liechtenstein), the use of the word "*territories*" would then be incongruous. It is made clear by Article 126(2) that "*territories*" refers to territories which are not included within the Contracting Parties' national borders, but for which the Contracting Parties have diplomatic responsibility. Article 126(2) then disapplies the Agreement from some of those territories.

A fair overall view would be that – if the United Kingdom left the EU by triggering Article 50 but did nothing else in relation the EEA Agreement – the United Kingdom would be likely to maintain many, if not most, of its obligations under that Agreement. However, its position would undoubtedly be anomalous and there would be much legal uncertainty as to the rights of both EEA citizens and companies in the UK and UK citizens and companies in EEA states.

How could the UK definitively leave the EEA Agreement?

Article 127 of the EEA Agreement allows any Member State to give one year's notice of withdrawal. Unlike Article 50 of the EU Treaty, there is no further provision for a withdrawal agreement. In the EEA Judicial Review the Government also pointed out that it would also be possible for the United Kingdom to withdraw from the EEA Agreement with the consent of all the other parties (the EU, all other EU Member States acting individually, and Norway, Iceland and Liechtenstein): that is technically correct, but it is hard to see why such an agreement would be necessary, practical or desirable given Article 127.

What role does Parliament have in a decision to leave the EEA?

The Claimants in the EEA Judicial Review argued that the UK Government could not leave the EEA Agreement under Article 127 (or by agreement of all the other parties) without first obtaining an Act of Parliament authorising it to do that. That argument was based on the Supreme Court's decision in *Miller*. The Government never replied on the merits of that argument and neither did the High Court give any ruling on that argument. The High Court made it clear that it was not expressing any view on the merits of the claimant's arguments. Rather, the High Court decided that the application for judicial review had been made too soon, since the Government had not yet made a decision as to how it wished to proceed (whether by invoking Article 127 or by relying on notification under Article 50).

Where are we now?

The EEA Judicial review did not deal with the issues: it simply said that the claim had been premature, i.e. made too early. The EU (Notification of Withdrawal) Bill now before Parliament says nothing about the EEA Agreement. All it does is to give the Prime Minister the power to invoke Article 50 of the EU Treaty. As explained above, and as a result of the EEA Judicial Review, it appears the Government now accepts that relying on Article 50 (and withdrawing from the EU) is not sufficient to prevent the United Kingdom remaining a "*Contracting Party*" to the EEA Agreement. The Government instead appears to believe that the United Kingdom would have few if any remaining obligations under the EEA Agreement once the UK has withdrawn from the EU.

But it is neither credible nor acceptable that the Government should take that position. The Government itself has said that the EEA arrangements would be "*unworkable*" in such circumstances. However, as explained above, there is a very strong case that the United Kingdom would still be bound by its single market obligations under the EEA Agreement, in particular in relation to those parties that are not members of the EU (and their citizens). Further, if the Government's position is to be accepted, it is improper for the Government (any government) deliberately to follow a course

which will result in significant legal confusion, in which individuals' and business's rights and obligations are unclear and insecure.

The clearly more sensible route would be for the Government to seek to leave the EEA Agreement by a notice under Article 127. Following *Miller*, that would require specific authorisation by an Act of Parliament. As there is no such provision in the present EU Withdrawal Bill, this would appear to indicate that there will have to be a separate provision in the "Great Repeal Bill" promised for the 2017/18 Session dealing with the UK's membership of the EEA.

That means that Parliament should have a separate opportunity to decide whether it is right for the United Kingdom to leave the EEA. That is, rightly, a decision for Parliament, not the Courts. But Parliament will doubtless bear in mind the following:

- The question of leaving the EEA and the single market was not on the referendum ballot paper.

- Several high profile "leave" campaigners, and some "leave" voters, supported continued EEA membership (the "Norway option") (at least for a transitional period).

- Over 48% of voters voted "remain" (and are therefore most likely to prefer EEA membership over leaving the single market).

- The UK's continued membership of the EEA does not raise the same concerns felt by many "leave" voters towards the EU (e.g. the jurisdiction of the CJEU, absence of any ability to control unsustainable migration from Europe, dislike of the CAP, inability to reach separate trade agreements with third countries, EU intervention into areas of domestic policy). EEA membership allows continued unfettered and complete access to the single market, a meaningful ability to influence its future development and avoids EU intrusion into domestic affairs.

- No major political party at the last general election advocated withdrawal from the single market. On the contrary, the major political parties supported it.

The UK's membership of the EEA is a sustainable and workable compromise (even if only as a transition arrangement). Since it already exists is easily capable of being adopted and adapted to suit particular concerns of the United Kingdom within the short Article 50 window, so giving vital certainty to business and individuals. At the very least, since Parliament has endowed EEA rights upon UK citizens through the European Economic Area Act 1993, Parliament, not the Government, should decide if those rights are to be removed. This decision should only take place after full and informed debate and only after there has been an economic impact assessment of the costs and benefits of the United Kingdom leaving the EEA, including consideration of whether withdrawal from the EEA is a proportionate means of achieving the Government's objectives.

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