



# Scotland, EFTA and the EEA – a Norwegian perspective

Faculty of Advocates “Brexit” Conference

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Professor Halvard Haukeland Fredriksen





## Can the EEA Agreement survive Brexit?

- Brexit as a shock also to the EEA and the EFTA States
- UK exit from the EEA raises many of the same legal and political questions as UK exit from the EU
  - What about the rights of EFTA nationals living in the UK and UK nationals living in the EFTA States? Etc.
- EEA-related EU-Norway/Iceland agreements on fish quotas and on trade in fish and agricultural products have to be renegotiated
- A solution for future free trade between the UK and the EFTA States has to be found
- Political reactions in Norway:
  - The No to the EU movement is mobilizing against the EEA Agreement
  - The government does its best ‘not to rock the boat’



## A worst case scenario from the EEA EFTA States' point of view: A defiant UK in the EEA

- The UK decides to remain in the EEA as a temporary crisis solution as the two year deadline in Art 50 TEU is approaching with no market access solution in sight
  - Either by ‘forcing’ its way into the EFTA and the EFTA pillar of the EEA Agreement
    - Politically very difficult for the EFTA States to block if supported by the EU
  - Or, even worse, by refusing to withdraw from the Agreement and argue that it remains applicable to the UK as an independent Contracting Party outside the two-pillar structure of the Agreement
    - EEA-exit requires a formal declaration of withdrawal to all of the other Contracting Parties with 12 months’ notice (Art 127)



## A defiant UK in the EEA (cont.)

- A UK in a clash with the EU and with a short-term perspective on its EEA membership can do irreparable harm to the EEA
- The EEA Agreement offers plentiful opportunities for conflicts
  - Refusal to accept new EU-legislation into the Agreement?
  - Unilateral safeguard measures (Art 112)
    - In case of “serious economic, societal or environmental difficulties of a sectorial or regional nature liable to persist”
    - Fulfilled with regard to the free movement of persons into the UK?
- Refusal of national authorities and/or courts to follow rulings from the ECJ or from the EFTA Court
- Main problem: Lack of a judicial dispute resolution mechanism for EU-EFTA disputes
- Likely result: Suspensions, safeguard measures, rebalancing measures etc.

## A better (but highly unlikely) scenario: The UK in the EFTA pillar with a long-term perspective

- A UK concerned with the long-term stability and sustainability of the EEA could be an asset for the EFTA States
  - Will add a lot of bargaining power vis-à-vis the EU
  - The institutions of the EFTA pillar will gain prestige
- But the UK will also complicate life within the EFTA camp considerably
  - Profound differences between the Nordic and the English view of the EU's regulation of the internal market
- In any event: Highly unlikely that the UK would ever want to remain part of the EU internal market without any influence over the development of the rules of the game



Frank Bakke-Jensen, outside the Royal Palace in Oslo | Audun Brassta/AFP via Getty Images

## Hard Brexit is 'wise,' Norway says

It will be difficult for Britain 'to get as good a deal as Norway has today,' Norway's EU minister says.

By **ANCA GURZU** | 1/18/17, 5:19 PM CET | Updated 1/19/17, 5:40 PM CET

U.K. Prime Minister Theresa May's decision to fully leave the European Union's single market at the end of the Brexit process is "wise," Norway's EU Affairs Minister Frank Bakke-Jensen told POLITICO in an interview.

"Britain alone would have a difficult task to get as good a deal as Norway has today," he said.

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## A very different scenario: Scotland in the EEA

- Requires the support of all of the EEA Contracting Parties
  - The UK
  - The EEA EFTA States
  - The EU and all of the EU Member States
  - Switzerland?
- Politically possible?
  - Norway's EU Affairs Minister Frank Bakke-Jensen:
    - "I can't see that it would be possible for Scotland to be part of the EU or the EEA as long as they are part of Great Britain."  
(Politico, 18.1.2017)
    - But this statement is very much a result of the 'do not rock the boat'-strategy of the Norwegian government
  - UK?
  - Spain?



## Scotland in the EEA – some hard questions

- Will the Scottish Parliament get the powers necessary to comply with EEA law?
  - Norwegian concern: Could be a constant constitutional headache with regard to further development of the EEA Agreement
- Free movement of goods both in the EEA and in the UK: How to avoid a Scottish ‘bypass’ of tariffs on trade between the UK (England) and the EU?
  - Border controls as the only possibility?
- Free movement of persons both in the EEA and in the UK: How to avoid the use of Scotland as an access route to the rest of the UK?
  - Border controls as the only possibility?





## EEA vs. EU membership

- The most obvious disadvantage: Lack of influence over the future development of the internal market *aquis*
  - If coupled with financial contributions under the EEA Financial Mechanism, it's quite close to taxation without representation
  - But the financial contributions are not at 'EU level'
- Some substantive law issues:
  - Free movement of goods limited to products originating in the Contracting Parties (Art. 8(3) and Protocol 4)
    - Limits the possibility to import products from third countries (England included!) with a view to work or process them for export to other EEA States
  - Fish and agricultural products largely excluded
  - EU Common Agricultural Policy not part of the EEA
  - EU Common Commercial Policy not part of the EEA
  - The Brussel I-regime not part of the EEA



## EEA vs. EU membership (cont.)

- Institutional problems related to EU agencies (food safety, financial services, chemicals, medicines, telecom, energy, data protection etc.)
  - No voting rights
  - EFTA Surveillance Authority to rubber-stamp drafts from the agencies
  - Inadequate judicial protection for individuals
- Competition law:
  - No decentralised enforcement of EEA Competition Law in the EU
  - Merely observatory status for EFTA States' NCAs in the European Competition Network
  - 'Cross-pillar' effect of decisions and judgments uncertain
  - The Damages Directive (Dir 2014/104) deadlocked in the EEA JC
  - EFTA States not attractive jurisdictions for multinational damages actions



## EEA vs. EU membership (cont.)

- Institutional problems (cont.):
  - Lack of a proper judicial dispute resolution mechanism for “cross-pillar” (EU-EFTA) disputes
  - Settlement of disputes through diplomacy (Art. 111)
  - Deadlock in the EEA JC opens up for suspension of affected parts of EEA law and/or safeguard measures (which again may open up for rebalancing measures)
  - Limited possibilities for judicial dispute resolution:
    - Voluntary referral to the ECJ
    - Scope or duration of safeguard measures and proportionality of rebalancing measures can be referred to arbitration, but not the underlying legal dispute

## An independent Scotland in the EFTA pillar of the EEA as a medium-term solution?



- A best-case scenario from a Norwegian perspective: An updated and democratic 'EEA 2.0' with Scotland and Switzerland in the EFTA pillar
  - Will strengthen the EFTA-pillar without the marginalization of the existing members that will be caused by UK membership
- Scottish perspective: A mid-term solution while negotiation for EU membership?
- But perhaps even a lasting alternative if the EFTA States can secure real participation in the EU decision-making process for the future regulation of the internal market?



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