

The EEA Agreement: what is the ‘Norwegian Model’? *

Post: 1

The EEA Agreement, often described as the ‘Norwegian model’ has been mentioned as an option for the UK following the referendum. But what is it? This series of Monckton Brexit Blog posts will provide insights as to what the EEA Agreement actually is, and how it functions. It will focus on:

- *What does the EEA Agreement cover?*
- *The Structure of the EEA*
- *The EEA Joint Committee - its role in the introduction of new legislation*
- *The roles of the EFTA Surveillance Authority and EFTA Court*
- *EFTA Surveillance Authority*
- *The EFTA Court*
- *Principles of EEA Law*
- *Competition law*

This Monckton Brexit Blog post will introduce the EEA Agreement and describe the Agreement’s scope.

The Single Market encompasses the EU and the countries of the European Free Trade Association¹ of which (as some may recall) the UK was a founding member.² This is achieved by the Agreement on the European Economic Area (“EEA Agreement”). The EEA Agreement ensures that the same Single Market law is interpreted consistently across the EEA. In EEA law this is termed ‘homogeneity.’ The EEA/EFTA States have not ‘pooled’ their sovereignty as EU Member States have. There is no ‘ever closer Union’. Instead, the EEA Agreement is an ‘enhanced free trade area’.³ The EEA Agreement seeks to achieve a homogeneous European Economic Area, based on common rules ‘without requiring any Contracting Party to transfer legislative powers to any institution of the EEA [. . .].’⁴

Nevertheless, as discussed below substantive homogeneity means the provisions of EU law and EEA law concerning the fundamental freedoms, competition and State aid law as well as harmonised economic law must be interpreted in a uniform way in both EEA pillars. Effect-related homogeneity means that citizens and economic operators must be able to defend their rights flowing from the EEA Agreement in a comparable way in both EEA pillars. In this respect, the EEA contains (only, but still) an obligation of result.⁵ For EU practitioners the EEA Agreement is both extremely familiar yet divers. It is the same, but different.

What does the EEA Agreement cover?

The EEA Agreement to which all EU Member States (including the UK) are contracting parties provides countries, such as Norway and Iceland,⁶ full access to the Single Market. The EEA Agreement provides for the inclusion of EU legislation covering the Four Freedoms — the free movement of goods,⁷ services, persons and capital — as well as competition law,

State aid, public procurement and the major part of economic law, including Intellectual Property law, throughout the 31 EEA States.

In addition, the EEA Agreement covers cooperation in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as “flanking and horizontal” policies. The Agreement guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA.

That being said, the EEA Agreement is not completely identical to the EU Treaties as agriculture, fisheries and customs provisions are intentionally excluded.⁸ Furthermore, EU developments that go beyond the core of the internal market (e.g. Monetary Union (EMU) or the Common Foreign and Security Policy) are also excluded.⁹ That is not to say that EEA/EFTA States are prevented from being party to what one might imagine to be purely EU arrangements. For instance, each EEA/EFTA State (but also Switzerland) has chosen to be associated to the Schengen Agreement.¹⁰ Likewise, the three EEA/EFTA States have chosen to be Erasmus+ ‘programme countries’, in exactly the same way as EU Member States, allowing their students to study at university in another European country.¹¹ Norway and Iceland, for instance, also take part in the ‘Horizon 2020’, the EU’s research and innovation programme.¹²

* Michael-James Clifton LL.B. (EU), LL.M. Adv. Barrister, formerly Legal Secretary (*référéndaire*) to the President of the EFTA Court, Carl Baudenbacher. The author is currently completing his pupillage at Monckton Chambers before returning to the EFTA Court as *chef de cabinet* (chief of staff) to the President on 1 August 2016. All views expressed are personal to the author.

¹ Excluding Switzerland.

² While not related directly to the EEA, it is worthy of note that the EFTA States have at present 27 free trade agreements (covering 38 countries) with the following partners: Albania, Bosnia and Herzegovina, Canada, Central American States (Costa Rica, Guatemala and Panama), Chile, Colombia, Egypt, Georgia, Gulf Cooperation Council (GCC), Hong Kong, China, Israel, Jordan, Korea, Republic of, Lebanon, Macedonia, Mexico, Montenegro, Morocco, Palestinian Authority, Peru, Philippines, Serbia, Singapore, Southern African Customs Union (SACU), Tunisia, Turkey, and Ukraine (<http://www.efta.int/free-trade/free-trade-agreements> accessed 6 July 2016). A short description of the main subjects addressed in EFTA free trade agreements may be found at http://www.efta.int/sites/default/files/documents/free-trade/EFTA_website_-_Free_trade.pdf.

³ Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraph 59.

⁴ Recital to Protocol 35 EEA. See *Páll Hreinsson*, General Principles, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.383.

⁵ *Carl Baudenbacher*, The EFTA Court: Structures and Tasks, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016) p.145.

⁶ The original EEA/EFTA States were: Norway, Sweden, Austria and Finland. At present there are three EEA/EFTA States: Norway, Liechtenstein and Iceland. Switzerland was due originally to become an EEA State but decided to remain an EFTA State only. The original EEA/EFTA States were on 1 January 1995: Austria, Finland, Iceland, Norway, and Sweden.

⁷ Article 8(3) EEA provides that free movement applies to certain categories of goods only: -

“Unless otherwise specified, the provisions of this Agreement shall apply only to:

(a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;

(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.”

See *Sven Norberg*, *The European Economic Area*, in: *Oliver on Free Movement of Goods in the European Union* (Oliver (Ed.)) Fifth Edition, Hart Publishing (2010), pages 492 to 495, and *Peter-Christian Müller-Graff*, *Free Movement of Goods*, in: *The Handbook of EEA Law* (Baudenbacher Ed.), Springer (2016).

⁸ Although the EEA Agreement contains provisions on various aspects of trade in agricultural and fish products.

⁹ Other policies excluded are, in particular: the EU's Common Foreign Trade Policy; and Justice and Home Affairs (although all four EFTA countries are part of the Schengen area).

¹⁰http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm accessed 28 June 2016.

¹¹ http://ec.europa.eu/programmes/erasmus-plus/about_en#tab-1-1 accessed 28 June 2016.

¹²http://ec.europa.eu/research/participants/data/ref/h2020/grants_manual/hi/3cpart/h2020-hi-list-ac_en.pdf accessed 28 June 2016.