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**“25 Years EEA – Could the EEA Offer a Solution to the Brexit
Conundrum?”**

Section for External Relations of the European Economic and Social Committee, 24
May 2019

I. A distinct form of integration

1. Economic integration

- Extension of the EU single market to the EEA/EFTA States
- Political integration left to intergovernmental action

2. Sovereignty of EEA/EFTA States untouched in the fields of foreign trade, foreign politics, agriculture, fisheries

3. Two pillar model

- Own institutions of the EFTA pillar (EFTA Surveillance Authority and EFTA Court)
- “A distinct legal order of its own” (E-9/97 *Sveinbjörnsdóttir*)

I. A distinct form of integration

4. Longevity of the two pillar model

- From 7 to 5 to 3 EFTA States and from 12 to 28 (27) EU States
- EFTA pillar since 1995: A pond with a big fish and two minnows
- EU agencies as a challenge
 - New financial architecture
 - Third Energy Package (see my legal opinion for the Icelandic Foreign Ministry of 5 May 2019, <https://www.althingi.is/altext/erindi/149/149-5447.pdf>)

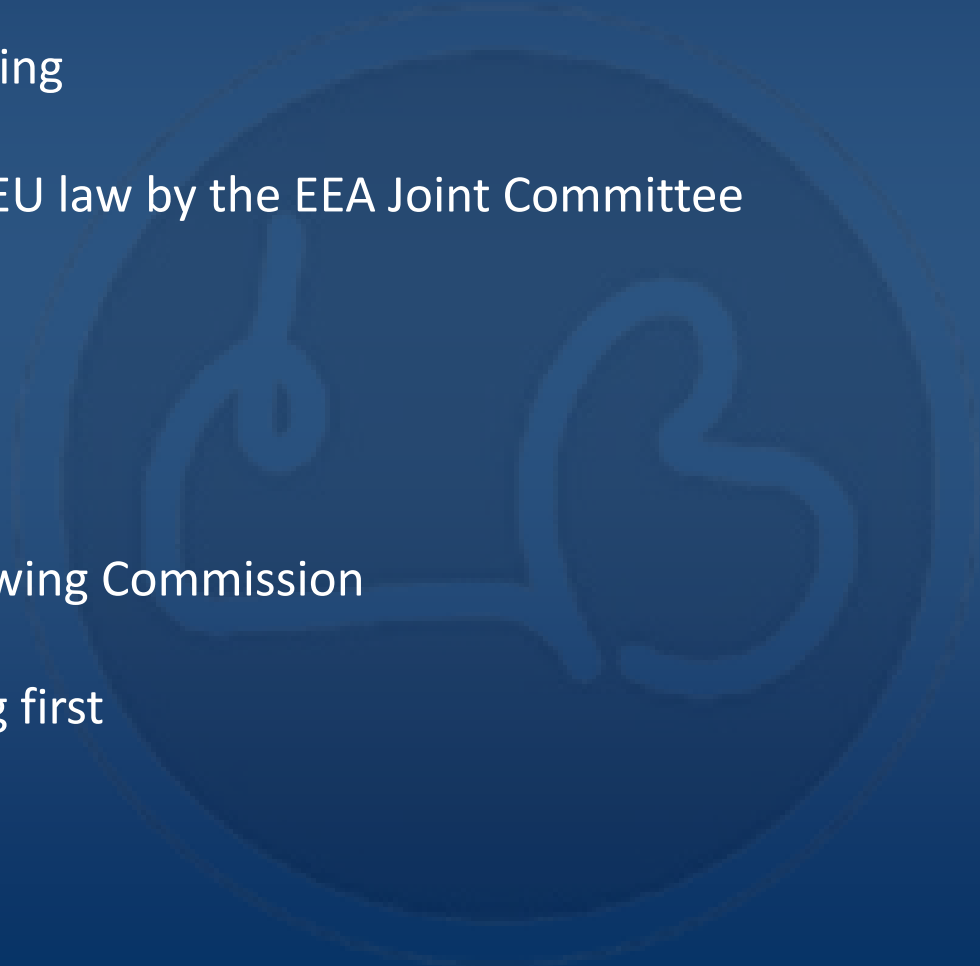
II. Key features

1. Legislation

- Homogeneity principle
- Decision shaping vs decision making
- Taking over of new EEA relevant EU law by the EEA Joint Committee

2. Surveillance

- Homogeneity principle
- EFTA Surveillance Authority following Commission
- EFTA Surveillance Authority going first



II. Key features

3. Judicial control

- Homogeneity principle
- EFTA Court following ECJ
- ECJ following EFTA Court (Going first and EFTA values)
- Cases: E-3/00 *Kellogg's*; E-1/04 *Fokus Bank*; E-4/09 *Inconsult*; E-15/10 *Norway Post*; E-8/13 *Abelia*; E-16/16 *Fosen Linjen*; E-5/16 *Vigeland*.
- EFTA Court is an independent court of law.
- No competences of the EEA Joint Committee in case of judicial conflict.

III. Brexit and EFTA

1. Two souls in Europe's breast (Switzerland included)
 - Common law countries vs civil law countries
 - England is the birthplace of the common law
 - FRA, GER, ITA, ESP are the most important civil law countries
 - NOR, ICE, CH, LIE: Hybrids between common and civil law
 - Article 1 of the Swiss Civil Code: Judge as legislature
 - ICE and NOR do not have a concise civil code
 - Swiss judges in LIE; Anglo-Saxon trust legislation

III. Brexit and EFTA

2. Other commonalities of UK and the (four) EFTA States

- Belief in free trade and open markets
- No Hegelian glorification of the state as “the reality of the moral idea” in UK, CH and LIE
- No French concept of “*la Nation*” as being the only legitimate power
- NOR characterised by a strong state
- This is, however, not the case in ICE
- François Hollande in June 2016: EU27 should consider “adapting” EU competition law focusing on growth, employment and investment.

III. Brexit and EFTA

2. Other commonalities of UK and (four) EFTA States

- Image of man
 - UK, CH, LIE: Assumption that human beings are reasonable in the sense of “normal.”
 - The man on the Clapham omnibus (Lord Justice Greer in *Hall v Brooklands Auto-Racing Club*, 1933).
 - EFTA Court E-4/09 *Inconsult*; E-15/15 and E-16/15, *Vienna Life and Swiss Life*: The same.
 - Goes against the German concept of “Lizzi Miller”.

IV. Brexit and EEA

1. Common values UK – EEA/EFTA States (as described)
2. Own institutions of the EFTA pillar (as described)
3. Regaining sovereignty in foreign policy, agriculture, fisheries
 - General
 - As regards sovereignty in foreign trade: For the time being Irish problem
 - Technical solutions in the near future?
4. Access to the single market (also for City of London)

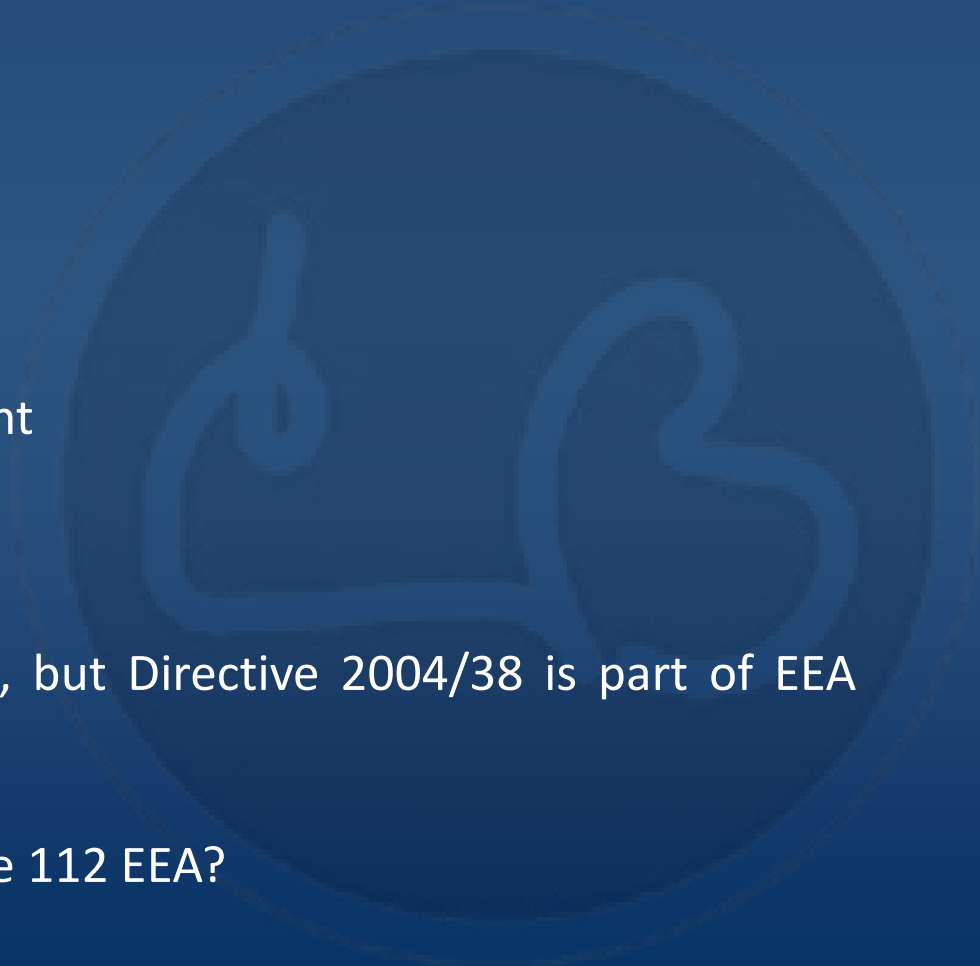
IV. Brexit and EEA

5. Legislation: Alleged “rule taking” – exaggerated

- Assessment of EEA relevance
- Input in decision shaping phase
- EEA Council
- EEA Joint Committee
- Acceptance by national Parliament

6. Free movement of persons

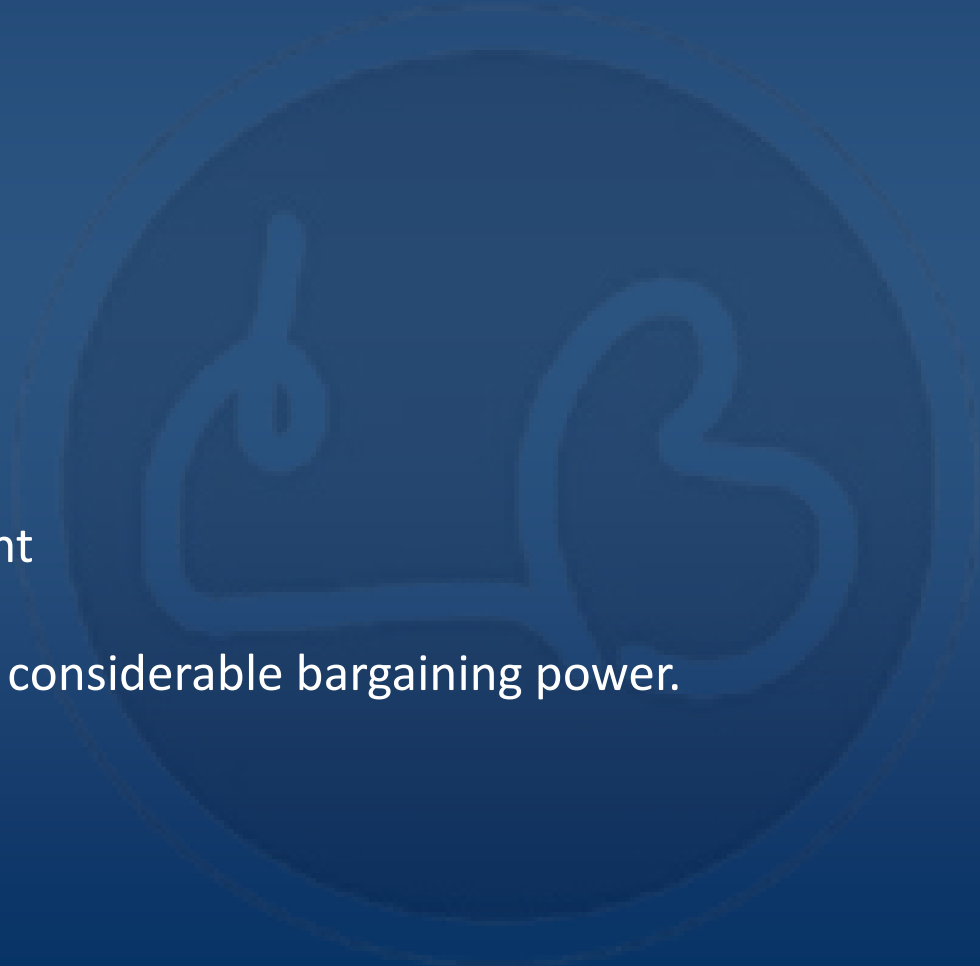
- No concept of union citizenship, but Directive 2004/38 is part of EEA law; EFTA Court case law.
- Safeguard measures under Article 112 EEA?



IV. Brexit and EEA

5. Legislation: Alleged “rule taking” – exaggerated

- Norway has enormous influence in the fields it considers vital
- Assessment of EEA relevance
- Input in decision shaping phase
- EEA Council
- EEA Joint Committee
- Acceptance by national Parliament
- UK would in view of its size, have considerable bargaining power.



V. Alternatives

1. UK Government's withdrawal agreement

- Including the “Ukraine mechanism” for dispute resolution
- Martin Howe, QC: The “independent” arbitration panel will simply act as a “postbox for sending the dispute to the ECJ. And as a rubber stamp when the answer comes back.”
- Mervyn King: “Vassal States do not go gently into that good night. They rage.”
- Compare Dylan Thomas's famous poem about death.
- Compare the 1701 Act of Settlement

2. No deal Brexit

3. Remain



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