

P.R.I.M.E. Finance
Panel of Recognized International Market Experts in Finance

The Reality of Brexit: The EEA or a Variation?



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A. Introduction

“

We should get out of the empire of EU lawmaking and what we should have instead is access to the single market.”

Boris Johnson MP, Leave campaigner



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A. Introduction

“Our policy is having our cake and eating it.
We are Pro-secco but by no means anti-pasto”.

(Boris Johnson to “The Sun” on 30 September 2016.)

Nothing that leaves us “half-in, half-out.” No model already enjoyed by other countries. Out of the Single Market. Bespoke Free Trade (“Customs”) Agreement. “The right deal for Britain.”

(Theresa May on 18 January 2017).



A. Introduction

EEA implicitly (not explicitly) ruled out.

Based on a number of wrong assumptions:

Single market does not necessarily mean ECJ; there is the independent EFTA Court.

The EFTA Court has less jurisdiction than the ECJ.

EEA/EFTA States are in single market, but not in customs union.

Brexit is not a still photograph, it is a moving picture (*Sylvester*).



A. Introduction

Options:

1 Hard Brexit without a Bespoke Agreement.

2 The UK Government may change its position on EEA.

3 Docking to the EEA solution.

4 Hard Brexit with a bespoke agreement.

Scots, Welsh and industry want to remain in the single market.



B. Access to the Single Market after Brexit

I. Access for Non-EU-States only with a surveillance and court mechanism

EU Council conclusions regarding Switzerland in 2008, 2010, 2012, 2014.

CH linked to EU by network of bilateral sectoral agreements.

But since 2008, no new agreement has been concluded.

Will that also apply to the UK after Brexit?



B. Access to the Single Market after Brexit

II. EEA membership will end with Brexit

Two pillar model: EU and EFTA.

You have to be part of a pillar; you cannot float from one pillar to the other.

Article 126(1) EEA:

“The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway.”



B. Access to the Single Market after Brexit

III. Full EEA membership on the EFTA side

Extension of the EU Single Market to the EFTA States.

- Fundamental freedoms.
- Competition and State aid law.
- Harmonised economic law; 'passporting' rights for financial operators (E-15/15 and 16/15 *Swiss Life* and *Vienna Life*).

Economic goal, no 'ever closer Union.'

No common policies in the fields of foreign trade (no customs union), agriculture, fisheries, taxation.

Own common EFTA institutions (EFTA Surveillance Authority and EFTA Court).



B. Access to the Single Market after Brexit

IV. Docking to the EEA/EFTA institutions (i)

EU proposal to the Swiss Government in 2012/2013.

Under existing sectoral agreements CH – EU dispute resolution lies in the hands of diplomatic bodies (joint committees).

EU deems this to be not anymore sufficient.

EU: CH may dock to the institutions of the EFTA pillar (ESA and the EFTA Court).

CH would have the right to nominate a member of the ESA College and a judge of the EFTA Court.



B. Access to the Single Market after Brexit

IV. Docking to the EEA/EFTA institutions (ii)

Swiss College Member and Swiss judge would sit in the cases concerning the CH-EU sectoral agreements.

Docking model would require consent of Iceland, Liechtenstein, Norway and of the EU and probably its Member States.

Federal Council rejects docking solution.

Is determined to put Switzerland on a track what will ultimately lead to EU membership.



C. Why the EFTA Court?

I. Initial question

Why should Britain accept ESA and the EFTA Court if it dislikes the Commission and the ECJ?

EEA homogeneity rules: EFTA Court shall follow or take into account ECJ case law; level playing field.

But:

Own surveillance authority and own court are an advantage.

Britain (as Norway, Iceland, Liechtenstein) would always have an own actor (due to the size of the EFTA institutions).



C. Why the EFTA Court?

II. EFTA pillar is less onerous than EU pillar (more sovereignty)

- No direct effect/ no primacy; only after implementation in domestic legal order.
- “Obligation of result” (difficult to enforce).
- No penalty payments in case of non-compliance with infringement judgment.
- No written obligation of courts of last resort to refer (“more partner-like relationship”).
- Preliminary rulings not formally binding.
- But duty of loyalty and principle of reciprocity.
- Right to a fair trial (Article 6 ECHR).



C. Why the EFTA Court?

III. EFTA Court going first

Some 160 references by ECJ, AGs, GC, to EFTA Court case law.

Then ECJ President *Vassilios Skouris* in 2014: Symbiotic relationship marked by mutual respect and dialogue: flow of information in both directions.

Former Commission DG and WTO AB Chairman *Claus Ehlermann*: Healthy (regulatory) competition.

Recent examples:

- Legal situation of a trust (E-3/13 and E-20/13 *Olsen*; GA *Kokott* C-646/15 *Panayi*).
- Access to the case file (GA *Bobek* C-213/15 P *Kommission gg. Breyer*).



C. Why the EFTA Court?

IV. If there is ECJ case law

Judging is no exact science.

The EFTA Court is not a court of lower instance.

Homogeneity is no snapshot in time.

A mature court has more self-confidence.

We must be convinced.

Homogeneity rules, but independence (E-28/15 *Yankuba Jabbi*).

Triangle ECJ – EFTA Court – ECtHR (right to a fair trial, freedom of expression, negative freedom of association as examples).



C. Why the EFTA Court?

V. The EFTA Court's social model (image of man)

Traditional EFTA values.

Free trade, market orientation.

Relevance of economics, fact-based approach instead of presumptions and fictions.

Liability of banks, avoiding moral hazard (E-16/11 *Icesave I*).

The 'man on the Clapham omnibus' (E-4/09 *Inconsult*: Consumers can be expected to download or print out a document from the website of a financial services provider; E-15/15 and 16/15 *Vienna Life an Swiss Life* (trade in used ["second-hand"] life assurance policies is not subject to normal consumer protection rules).



D. Other bones of contention

I. Voting right

II. Free movement of persons

III. Payments to the EU and/or its Member States



G. Conclusion

“[I]t is personalities, not principles, that move the age.”

(*Oscar Wilde, The Picture of Dorian Gray, Chapter III.*)



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