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# The UK withdrawal from the EU

Legal implications for Norway as party  
to the EEA Agreement

Christophe Hillion



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# The UK withdrawal from the EU

## Legal implications for Norway as party to the EEA Agreement

Christophe Hillion

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# 1. Introduction<sup>1</sup>

By leaving the European Union, the United Kingdom withdraws from all EU international commitments. The disentanglement of the UK from the EU will thus affect third states and organisations with which the EU entertains relations. Norway will be no exception, particularly in view of the many agreements the country has concluded with the EU, covering a wide range of areas and entailing a high degree of integration with the Union's legal order<sup>2</sup>.

In some areas, the UK withdrawal will affect Norway like any other third country partner to the EU. In others, Norway will find itself in a unique situation. This is notably the case in areas covered by the Agreement establishing the European Economic Area (EEA). Given that the latter extends the Single Market to Norway (and Iceland and Liechtenstein), the separation of the UK from the EU will have consequences for Norwegian citizens, businesses and stakeholders in a way which is comparable to how it will affect citizens, businesses and stakeholders from the remaining EU Member States.

The purpose of this report is to examine salient legal implications of the UK withdrawal from the EU for Norway, as a Contracting Party to the EEA. It first analyses the modalities of the UK withdrawal from the EEA Agreement itself (2). Then, it discusses the possible repercussions of the withdrawal negotiations (and agreement) between the EU and the UK on the EEA (3). Against this backdrop, the report highlights possible avenues for the EU and Norway to fulfil their joint obligation (and

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This report was commissioned from NUPI by the Norwegian Ministry for Foreign Affairs. The report relies on a legal analysis of available primary sources (EU and EEA legal instruments) and on official EU documents articulating the modalities of the withdrawal process as set out in Article 50 TEU (guidelines adopted by the European Council on 29 April 2017 and negotiating directives adopted by the Council on 22 May 2017).

<sup>2</sup> NOU 2012:2. Utenfor og innenfor. Norges avtaler med EU.

presumably, their joint interest) to preserve the integrity of the Single Market, pending and after withdrawal (4).

The analysis does not however go into detail on the future relationship between the EU and the UK, nor between the latter and Norway. Nor does it venture into the many implications of UK withdrawal in areas not covered by the EEA Agreement. Also, the report does not discuss the implications for Norway of a potential UK withdrawal without an agreement with the EU.

## 2. Withdrawal from the European Economic Area

The EEA Agreement contains a specific exit clause in its Article 127 which recognises the right for ‘each Contracting Party’ to withdraw from the Agreement<sup>3</sup>. Two questions thus arise: First, does the UK have an obligation (and not only a right) to leave the EEA in connection with its withdrawal from the EU (2.1.)? Second, what is the procedure to be followed to ensure an orderly withdrawal from the EEA (2.2.)?

### 2.1 Right or obligation?

In the terminology of EU law, the EEA Agreement is a ‘mixed agreement’. This means that the EU has concluded the Agreement together with its Member States, because the latter’s scope is deemed also to cover areas of national competence. Article 2 EEA thus defines the notion of Contracting Parties ‘concerning the Community and the EC Member States’, as follows: ‘the Community and the EC Member States, the Community and the EC Member States, or the Community, or the EC Member States.’ The term ‘EFTA States’ defined in the same Article, means ‘Iceland, the Principality of Liechtenstein and the Kingdom of Norway.’

Several provisions of the Agreement confirm that the EEA involves a relationship between the EU and its Member States, on the one hand, and EFTA States, on the other. For example, the Preamble of the Agreement refers to ‘the privileged relationship between the European Community, its Member States and the EFTA States’, while Article 126 EEA foresees that the Agreement applies geographically to the territories of the EU and of the EEA EFTA States, respectively. Indeed, the institutional framework set up by the Agreement reflects the geographical scope of the Area: Art. 93(2) EEA establishes that the EEA Joint Committee ‘shall take decisions by agreement between the

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<sup>3</sup> Article 127 EEA: ‘Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months’ notice in writing to the other Contracting Parties. Immediately after the notification of the intended withdrawal, the other Contracting Parties shall convene a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement.’

Community, on the one hand, and the EFTA states speaking with one voice, on the other’.

In view of the above, once the UK leaves the EU, the country will no longer be covered by the geographical scope of the Agreement. If it is no longer an EU Member State (nor an EFTA state), it will no longer be able to take part in the EEA institutional set-up. These elements support the view that the UK withdrawal from the Union entails the withdrawal from the EEA as well. The question remains however, as to whether the termination of the UK participation in the EEA Agreement will occur automatically as a result of withdrawal of the EU, or whether it is subject to legal conditions.

On one view, withdrawal from the EU ipso facto means withdrawal from the EEA. Unless the UK shifts to the group of ‘EFTA States’, it will exit the EEA Agreement when it departs from the Union as it is the moment upon which, pursuant to Article 50(3) of the Treaty on European Union (TEU), the EU Treaties (and the EU *acquis* more generally, including the EEA Agreement) will cease to apply to the UK.

This view is premised on the notion that the EEA Agreement was concluded on the EU side by the Union jointly with its Member States, the latter not being autonomous Contracting Parties to the Agreement but parties acting together with the EU as a composite entity. According to the guidelines adopted by the European Council on the UK withdrawal ‘the United Kingdom will no longer be covered by agreements concluded by the Union, or by Member States acting on its behalf or by the Union and its Member States acting jointly’(emphasis added).<sup>4</sup>

On another view, the UK is a Contracting Party to the EEA Agreement alongside the EU. Consequently, those parts of the Agreement that are not covered by EU law, but which belong to the competence of the Member States, cannot in principle be denounced automatically pursuant to the withdrawal from the Union. Thus, to withdraw from the EEA as an autonomous Contracting Party, the UK has to trigger the procedure of Article 127 EEA.<sup>5</sup>

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<sup>4</sup> See paragraph 13 of the European Council Guidelines following the United Kingdom’s notification under Article 50 TEU (hereinafter, ‘the Guidelines’), EUCO XT 20004/17; Brussels, 29 April 2017.

<sup>5</sup> In this vein, it has been argued (thus far unsuccessfully) that a decision of the UK Parliament would be required explicitly to mandate the UK government to activate the procedure of Art 127 EEA, the way the Parliament had to mandate the UK government to activate the EU exit clause, in line with the decision of the UK



It is disputable that the non-activation of Article 127 EEA would entitle the UK to remain a full participant in the EEA after it has left the EU, merely by virtue of formally being a Contracting Party to the Agreement. As mentioned above, several provisions in the Agreement suggest that a Contracting Party must be a Member State of the EU or an EFTA State.

Substantively and institutionally, the EEA Agreement is not designed to apply to parties that are not included in either of the two groups. Should the UK leave the EU without simultaneously joining the group of EFTA States for the purpose of the EEA, it would simply no longer be included within the geographical scope of the EEA Agreement, as defined by Article 126 EEA; it would exclude itself from the operation of the EEA.

Admittedly, the UK has already indicated that it has no intention to be part of the EEA post- withdrawal. Should it nevertheless wish to do so, it would have to join the EFTA pillar of the EEA, including the Agreement of the EFTA States on the establishment of a Surveillance Authority and a Court of Justice. That would require the approval of all the other Parties.<sup>6</sup> Indeed, the transfer of the UK to the EFTA pillar as a way to remain party to the EEA Agreement could prove legally and practically difficult unless all Parties concerned accept that negotiations for such UK transfer may begin while it is still member of the EU. That is not a given, considering the EU position that in principle, the UK remains a member of the EU until effective withdrawal, and as such bound by all its EU law obligations, including respect for EU competences (paragraph 25 of the European Council guidelines).

## 2.2 Procedure

To leave the EEA Agreement, a Party must give ‘at least twelve-months’ notice in writing to the other Contracting Parties’ (Article 127 EEA). The timing of the notice is particularly significant when it concerns an EU Member State that has decided to leave the Union. As a state cannot be a member of the EU without participating in the EEA,<sup>7</sup> it

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Supreme Court in the Miller case . Further: ‘Fresh Brexit legal challenge blocked by high court’, *The Guardian* (3 February 2017).

<sup>6</sup> Cp. with the transfer of EFTA states to the EU in 1995.

<sup>7</sup> As members of the EU, states are bound by all EU external agreements, including the EEA Agreement, in line with Article 216(1) of the Treaty on the Functioning of the EU (TFEU).

cannot exit from the EEA before it leaves the Union. Similarly, as argued above, the UK cannot remain part of the EEA when it leaves the EU, unless it has joined the EFTA group. Coordination between the EU procedure (Article 50 TEU) and the EEA procedure (Article 127 EEA) is thus necessary to ensure the simultaneity of the two withdrawals.

Article 50(3) TEU foresees that the EU Treaties will cease to apply to the withdrawing state from the date of entry of the withdrawal agreement or, failing that, two years after the notification. In agreement with the withdrawing state, the European Council may nevertheless unanimously decide to extend that period. In other words, the date of the UK's effective departure from the EU remains in principle open.

The requirement enshrined in Article 127 EEA that the Contracting Party wishing to leave the EEA should give 'at least twelve months' notice' offers some flexibility as to the timing of the effective withdrawal from the EEA. The most practical option would thus be for the UK to notify the other EEA Contracting Parties early in the withdrawal process from the EU, and at the latest one year after it notified the European Council of its intention to withdraw from the EU, i.e. on 29 March 2018. The Contracting Parties could then agree that exit from the EEA would be effective on the same day as withdrawal from the EU.

In principle, the UK as party intending to leave should notify the other Contracting Parties to the EEA Agreement. However, one could also envisage that the EU itself gives notice, at least in relation to those parts of the Agreement for which the UK does not have competence as long as it is a Member State of the EU. In effect, the formal participation of the UK in the EEA Agreement only covers limited aspects of the latter, being otherwise part of the EEA through its membership in the Union.<sup>8</sup>

Unlike Article 50 TEU, the EEA exit clause does not foresee the negotiation of an agreement between the withdrawing state and the remaining EEA Parties to set out the terms of withdrawal. Instead, Article 127 EEA foresees that, the 'other Contracting Parties' (emphasis added) shall convene 'a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement'. Given that the Agreement does not give further details, and in the absence of

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<sup>8</sup> In respect of those matters, the European Commission could arguably give notice considering that, according to Article 17(1) TEU, and 'with the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation'.

precedent, the notion of ‘necessary modifications’ remains open to interpretation (see further below).

To be sure, Article 127 EEA is silent as regards the ratification of the ensuing ‘modification agreement’. Given that such modifications are to be agreed by a ‘diplomatic conference’, one may assume that they would have to be approved by all the Contracting Parties, in accordance with their own procedures.

### 3. Withdrawal from the European Union and its impact on the EEA

As seen above, Article 127 EEA draws up a procedure to be followed by the UK to withdraw from the EEA (how and when to notify) and a procedure for the remaining EEA parties to introduce necessary modifications into the Agreement to reflect the UK withdrawal. Arguably, the provision can only cater for a ‘hard brexit’ from the EEA, as it does not foresee any negotiations between the UK and the other Contracting Parties on the terms of withdrawal.

Such negotiations are however a key component of the EU withdrawal process as governed by Article 50 TEU. Norway and the other EEA EFTA States have a stake in these negotiations insofar as the terms of withdrawal that may be agreed between the EU and the UK concern the functioning of the Single Market (3.1). The Parties to the EEA Agreement (the EFTA States, the EU and its Member States, including the UK) have a common obligation to preserve the integrity of the Single Market throughout the process and beyond, and fulfilling this obligation may require different legal tools and consultation arrangements (3.2).

#### 3.1 Terms of UK withdrawal from the EU and their potential EEA dimension

Article 50 TEU sets out a procedure for the EU to negotiate and conclude a withdrawal agreement with the UK to establish the arrangements for the UK withdrawal, taking account of the framework for its future relationship with the Union. The withdrawal agreement is negotiated in accordance with Articles 50(2) TEU and 218(3) of the Treaty on the functioning of the European Union (TFEU). Potential agreements underpinning the future relationship between the EU and the UK would also be formally negotiated and concluded in the procedural framework of Article 218 TFEU, but the substantive legal basis (or bases) for these agreements would not be Article 50 TEU.<sup>9</sup>

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<sup>9</sup> Rather, as indeed highlighted in the Resolution of the European Parliament of 5 April 2017 (on negotiations with the United Kingdom following its

The European Council guidelines envisage a ‘two-phased approach’ to the withdrawal negotiations (paragraph 4). In the first phase, the Parties shall address specific ‘matters which, at this stage have been identified as necessary to ensure an orderly withdrawal’ for the EU (3.1.1.). Only if ‘satisfactory progress’ is achieved in this first phase of the negotiations, may the European Council decide to proceed to the second phase. Then, the parties could discuss the framework of the future relationship between the EU and the UK, although in the view of the EU, the finalisation and conclusion of any future agreement(s) would only occur once the UK has formally exited the Union (3.1.2.).<sup>10</sup> Both phases of the EU-UK withdrawal negotiations may have implications for Norway as a Contracting Party to the EEA Agreement.

### **3.1.1 First phase of withdrawal negotiations**

According to the negotiating directives approved by the EU Council on 22 May, the aim of the first phase is two-fold.<sup>11</sup> First, it should ‘provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom’s withdrawal from the Union’. Second, it should ‘settle the disentanglement of the United Kingdom from the Union and from all the rights and obligations the United Kingdom derives from commitments undertaken as a Member State’(paragraph 9).

Matters covered by the EU negotiating directives will have implications for Norway, albeit to a varying degree. The following discussion singles out three themes, which deserve particular attention from an EEA perspective: citizens’ rights, goods placed on the market under Union law before the withdrawal date, and the governance of the potential EU-UK withdrawal agreement.

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notification that it intends to withdraw from the European Union; P8\_TA-PROV(2017)0102) the substantive legal bases for future agreements could include Article 217 TFEU if the parties opt for an association agreement, possibly in combination with Article 8 TEU which is the legal basis for EU agreements with neighbouring states. They could also conclude a mere trade agreement (Article 207 TFEU), supplemented by other sectoral agreements e.g. in the fields of foreign and security policy (Article 37 TEU).

<sup>10</sup> The EU approach thus contrasts with that of the UK which, being more focused on the future UK-EU relationship, had envisaged parallel (negotiating withdrawal and new agreement simultaneously) rather than phased negotiations processes.

<sup>11</sup> Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union. XT21016/17, Brussels 22 May 2017, hereinafter ‘the EU negotiating directives’.

Settling the question of **citizens' rights** is the first priority for the EU in phase one of the withdrawal negotiations (part III.1 of the negotiating directives). Similarly, 'securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU' is described as one of the UK government's 'early priorities' for the withdrawal negotiations.<sup>12</sup>

According to the EU negotiating directives, the withdrawal agreement should 'safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date as well as rights which are in the process of being obtained', both for EU27 citizens residing (or having resided) and or working (or having worked) in the United Kingdom', and vice versa.<sup>13</sup>

In the view of the EU, 'the personal scope' of the guarantees to be included in the withdrawal agreement should be the same as that of Directive 2004/38 (i.e. the 'EU citizens Directive'). It should thus cover 'both economically active, i.e. workers and self-employed, as well as students and other economically inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date'.

As to the rights to be guaranteed, the directives of negotiation mention residence rights and rights of free movement as derived from the principle of non-discrimination based on nationality (Article 18 TFEU), free movement of workers (Article 45 TFEU), right of establishment (article 49 TFEU), and citizenship (article 21 TFEU), and as otherwise set out in the Citizens Directive.

The document also refers to the rights and obligations on the coordination of social security systems (Regulation 883/2004), and in particular the rights to aggregation and export of benefits, the rights deriving from the free movement of workers in terms of access to the labour market, right to pursue an activity, rights of workers family), and the right to take up and pursue self-employment derived from the right of establishment.

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<sup>12</sup> UK White Paper: *The United Kingdom's exit from, and new partnership with, the European Union*, pt 6.3. Published 2 February 2017.

<sup>13</sup> See also the Commission's Draft Position Paper: 'Essential Principles on Citizens' Rights, 29 May 2017; [https://ec.europa.eu/commission/publications/draft-eu-position-papers-article-50-negotiations\\_en](https://ec.europa.eu/commission/publications/draft-eu-position-papers-article-50-negotiations_en)

Apart from rules relating specifically to EU citizenship, the above-mentioned EU acts and treaty provisions are also covered by EEA law: The right of establishment and the free movement of workers are included in the EEA Agreement itself, and the mentioned secondary legislation has been incorporated in the Annexes of the Agreement. As part of EEA law, these acts and provisions govern the situation of Norwegian citizens and businesses (and of other EEA EFTA states) in the UK, the way they govern the situation of EU citizens and businesses therein.

Should the EU and UK agree to guarantee the rights of EU27 citizens, as derived from these EU norms, in the UK (and vice-versa), a lack of corresponding guarantees in the EEA EFTA-UK context would possibly generate differences of treatment among EEA nationals and businesses. EU27 nationals and businesses having exercised their EU-derived rights in the UK would have those rights guaranteed. EEA EFTA nationals and businesses having exercised similar EEA rights would not.

The negotiating directives underline that the guarantees to be included in the withdrawal agreement should be reciprocal and that they ‘should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU citizens as compared to UK citizens, as set out in the relevant EU acquis’ (paragraph 20).

Considering the cardinal importance of the principle of non-discrimination in the EEA context, one may argue that EU-UK guarantees would have to be matched by equivalent assurance for (or simply extended to) Norwegian citizens and businesses (and those of other EEA EFTA states) in similar situation in the UK (and vice versa). Otherwise, it would be difficult to preserve the full homogeneity in the application of those EEA norms, and ensure equal treatment in the enjoyment of the rights derived therefrom.<sup>14</sup> In the same vein, should the EU and the UK agree to adjust the scope of application of these norms in the post-withdrawal context, such an adjustment would arguably have to be

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<sup>14</sup> The same holds true as regards the recognition of professional qualifications, also evoked in the Negotiating Directives. The latter foresee that the Agreement should ensure, in the UK and in the EU27, the protection, in accordance with Union law applicable before the withdrawal date, of recognised professional qualifications obtained in any Member States before that date. An equivalence of treatment ought to be guaranteed at this level too. This would ensure that Norwegians with a British qualifications benefit from the same recognition as EU27 citizens with the same diploma and qualifications.

mirrored in the broader EEA context to ensure their homogenous application.

Alongside the issue of citizens' rights, the situation of '**goods placed on the market under Union law before the withdrawal date**' is another topic mentioned in the negotiation directives with direct relevance for the functioning of EEA.

The negotiating directives stipulate that, the withdrawal agreement 'should ensure that any good lawfully placed on the single market on the basis of Union law before the withdrawal date can continue to be made available on the market or put into service after that date both in the United Kingdom and in the EU27 under the conditions set out in the relevant Union law applicable before the withdrawal date...' (paragraph 31).

As EEA law includes free movement of goods, the scope of application of the envisaged guarantees may have to be extended to the EEA EFTA states, so that the goods concerned could be made available not only in the UK and in the EU27, but throughout the Single Market/EEA. Any difference in the EU-UK regime regarding those goods and their treatment in the EEA EFTA states would entail a fragmentation of the Single Market.

The EEA dimension of this matter was seemingly acknowledged by the EU when a slight terminological change was introduced to the draft version of the negotiating directives. While the earlier text referred to 'any good lawfully placed on the market of the Union on the basis of Union law', the latter refers to 'any good lawfully placed on the Single Market on the basis of Union law' (emphases added).

The third issue highlighted in the negotiation directives that will have significance for the functioning of the EEA, and thus for Norway, is the '**governance of the agreement**' between the EU and the UK. According to paragraph 17 of the negotiating directives:

*The Agreement should contain provisions relating to the overall governance of the Agreement. Such provisions must include effective enforcement and dispute settlement mechanisms that fully respect the autonomy of the Union and of its legal order, including the role of the Court of Justice of the European Union, in order to guarantee the effective implementation of the commitments under the Agreement, as well as appropriate institutional arrangements allowing for the adoption of measures to deal with unforeseen situations not covered by the agreement and for the incorporation of future amendments to Union law in the Agreement.*



A thorough analysis of the different aspects and impact of the intricate governance system envisaged by the EU would go beyond the scope of this report. Suffice to mention that this system raises several questions about the interface between the application of the potential EU-UK withdrawal agreement, and the application of any mirroring rules agreed in the relation between the EEA EFTA states and the UK.

Dynamism is a key characteristic of the system proposed to govern the EU-UK agreement. In particular, the EU envisages that it should be possible to incorporate future amendments to EU law into the withdrawal agreement (where it is ‘necessary for the implementation of the Agreement’). Further, surveillance and enforcement mechanisms, involving the European Court of Justice, should ensure homogenous application.

Should the EU and the UK agree to establish such a dynamic governance system, it would likely affect the functioning of the EEA. It notably raises the question of how a potential ‘EEA withdrawal arrangement’ (replicating the guarantees of the EU-UK withdrawal agreement) should be governed.

For instance, if citizens’ rights as guaranteed by the EU-UK Agreement were to be updated post-withdrawal as a result of internal EU developments, similar updating would be warranted as regards EEA EFTA citizens in a similar situation, to ensure that the EEA principle of non-discrimination is observed.

In the same vein, a breach of the EEA-derived right(s) of a Norwegian citizen located in the UK prior to withdrawal, could not as such be addressed post-withdrawal by the EU-UK agreement surveillance and enforcement system. An equivalent enforcement system for relations between the EEA EFTA States and the UK would have to be envisaged (alternatively, the EU-UK governance system would have to be extended to natural or legal persons from EEA EFTA States as well).

In other words, the principle of non-discrimination and the obligation of homogeneity of application of EEA rules require more than equivalent guarantees for all EEA citizens in substantive terms. They also entail a governance system, which makes sure that those guarantees are applied, interpreted, enforced and possibly developed in a similar fashion as in the EU-UK context. Only then would similar EEA/EU rights of Norwegian and French citizens in the UK be similarly protected post-withdrawal.

The above discussion of three significant aspects of the negotiating directives suggests that the terms of the EU-UK withdrawal agreement have relevance for the functioning of the EEA, and thus Norway. In substantive terms, several matters to be negotiated fall squarely within the scope of the EEA. In institutional terms, the complex governance of the envisaged withdrawal agreement raises the need for an equivalent system to ensure that similar rules in the EU-UK agreement and in the EEA EFTA-UK arrangements, respectively, are interpreted, applied, enforced and potentially developed in a similar fashion.

### 3.1.2 Second phase of withdrawal negotiations

While the themes and positions for the first phase of the withdrawal negotiations between the EU and the UK have been elaborated in detail, at least from the EU side, there is less clarity as regards the contents of the second phase. Paragraph 19 of the negotiating directives adopted on 22 May foresee that there will be new sets of directives for this second phase, but at the time of writing no such directives have been proposed, let alone decided by the EU. On the UK side, the ambition is to negotiate and conclude a ‘bold and comprehensive’ free trade agreement with the EU, possibly supplemented by agreements in other fields, like foreign and security policy and fight against terrorism.<sup>15</sup> However, the UK ambition is sparse on details.

The EU is clear that it is not legally possible to negotiate and conclude an agreement establishing the future relationship before the UK has formally left the EU. As the withdrawal agreement should nevertheless be negotiated ‘taking account of the framework for its future relationship with the Union’, the European Council Guidelines foresee that the second phase of negotiations under Article 50 TEU should identify an **‘overall understanding on the framework for the future relationship’**, through ‘preliminary and preparatory discussions’ (paragraph 5).

To be sure, the move to the second phase is subject to ‘sufficient progress ... made in the first phase towards reaching a satisfactory agreement on the arrangement for an orderly withdrawal’. In other words, the parties must have settled matters such as citizens’ rights and goods, evoked above, arguably also in their wider EEA dimension. From a Norwegian viewpoint, it will therefore be important to engage with the EU and the UK on these matters at an early stage of the negotiations.

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<sup>15</sup> UK White Paper, *op.cit.*

As the EU and the UK begin the preliminary and preparatory discussion on the new relationship, Norway too (alone or with the other EFTA states) could use this phase to agree with the UK on the elements that would have to be negotiated and concluded to establish new relations once the UK has left the EU and the EEA. This process goes beyond the scope of this study; suffice to say that it would be beneficial to Norwegian businesses and other stakeholders if initial talks on future relations with the UK moved forward in parallel to the second phase of EU-UK Article 50 negotiations.

It should be recalled that, in this phase, the UK is legally unable to negotiate and conclude international agreements in fields covered by EU law. In accordance with Article 50 TEU the UK remains an EU Member State, bound by its related obligations until effective withdrawal. While the European Council has recognised ‘the need, in the international context, to take into account the specificities of the [UK] as a withdrawing Member State’, it also underlined that the UK must ‘[respect] its obligations and [remain] loyal to the Union’s interests while still a Member’ (paragraph 26).

In addition, as regards Norway’s freedom of manoeuvre, the duty of cooperation established by Article 3 EEA requires that EEA Contracting Parties ‘abstain from any measure which could jeopardize the attainment of the objectives of this Agreement’. Together, these elements make clear that the UK and Norway are unable to sign and conclude an agreement in areas covered by EU law before the UK has become a third state.

The EU negotiating directives (paragraph 19) state that, having identified an ‘overall understanding on the framework for the future relationship’, the second phase of the negotiations may also envisage **transitional arrangements** ‘to the extent necessary and legal possible’ as ‘bridges towards the foreseeable framework for the future relationship’. Such transitional arrangements should be ‘clearly defined, limited in time, and subject to effective enforcement mechanisms’. Any time-limited prolongation of Union acquis ‘would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply’.

Transitional arrangements concerning the Single Market would have a direct impact on Norway and the EEA. Arguably, should the EU and the UK wish to prolong (temporarily) the application of EU Single Market rules to the UK post withdrawal, two basic scenarios are conceivable.

One scenario would be that the EU and the UK agree that the UK would ‘remain’ in the EEA post-exit on a temporary basis, until its future agreement with the EU is finalised and ratified.

As recalled above, the UK would have to accept the authority of the EEA institutions in general and of the ‘EFTA pillar’ in particular (i.e. the EFTA Surveillance Authority and the EFTA Court) and comply with developing EEA legislation.

Such an arrangement would require the full involvement and approval of the Contracting Parties of the EEA. If it is to provide a transitional arrangement when the UK effectively leaves to bridge membership and future relation, this scenario may prove practically and legally challenging. To be sure, such an arrangement would take time to materialise and probably longer than the time foreseen by Article 50 TEU to negotiate the withdrawal agreement, given the need for the support of all EEA Contracting Parties, including possibly by way of national ratification.

An alternative scenario would be for the EU and the UK to agree that EU Single Market rules would temporarily continue to apply to the UK. Based on the European Council guidelines and the EU negotiating directives, this arrangement would presuppose that the UK accepts the whole body of Single Market rules (considering the ‘no-cherry picking’ principle mentioned in the guidelines), and the authority of the EU surveillance and judicial mechanisms to ensure that EU rules are applied uniformly. The UK would thus remain temporarily in the EU pillar of the EEA – though having formally withdrawn from the EU. The question remains however, of whether the UK would accept being part of the EU internal market and governance post-withdrawal.

### **3.2 Legal means to preserve the integrity of the Single Market**

The foregoing suggests that UK withdrawal from the EU not only entails the UK departure from the EEA, but that the terms of withdrawal could include several EEA relevant aspects. Unless arrangements are envisaged for EEA EFTA states to match the terms of withdrawal as potentially agreed by the EU and the UK, the functioning of the EEA may be impaired.

Several elements contained in the European Council guidelines and the first EU negotiation directives testify that the EU is aware of the external implications of the UK withdrawal. It is thus recalled that the ‘main purpose of the negotiations will be to ensure the United Kingdom's

orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimise disruption caused by this abrupt change', and that the first phase of the withdrawal negotiations intends to '[p]rovide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union' (paragraph 4). Also, the negotiating directives recognise that,

*in line with the European Council guidelines, a constructive dialogue should be engaged as early as practicable with the United Kingdom during the first phase of the negotiation on a possible common approach towards third country partners, international organisations and conventions in relation to the international commitments contracted before the withdrawal date, by which the United Kingdom remains bound, as well as on the method to ensure that the United Kingdom honours these commitments (paragraph 18).*

Moreover, and this is of primary importance for Norway as participant in the EEA, both the guidelines and the negotiating directives emphasise, though without explicitly mentioning the EEA, that the integrity of the Single Market is to be preserved. Among the core principles underpinning the negotiations, the European Council thus recalls that,

*Preserving the integrity of the Single Market excludes participation based on a sector-by-sector approach. A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no "cherry picking" (paragraph 1).*

Touching upon the features of a possible post-exit EU-UK agreement, the European Council guidelines add that:

*Any free trade agreement should be balanced, ambitious and wide-ranging. It cannot, however, amount to participation in the Single Market or parts thereof, as this would undermine its integrity and proper functioning. It must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices (paragraph 20).*

In sum, both the withdrawal process and the post-exit negotiations are guided, on the EU side, by a strong commitment to preserve the integrity of the Single Market, and generally to minimise disruption. While these are reassuring signals from an EEA point of view, a

fundamental question remains: How should the Parties to the EEA Agreement preserve the integrity of the Single Market when the EEA EFTA States do not formally take part in the withdrawal negotiations between the EU and the UK? How can appropriate arrangements to prevent disruption in the functioning of the Single Market be extended to the EEA EFTA States? The final part of this report will flag up possible modalities, which are likely to operate in combination, considering the diversity of matters to be covered.

A first avenue to address the EEA-relevant implications of the UK withdrawal from the EU is the procedure of **Article 127 EEA**. As recalled above, this provision foresees the convening of a diplomatic conference among the remaining EEA Contracting Parties to introduce the necessary modifications to the Agreement.

The concept of ‘necessary modifications’ can be read in different ways. A narrow view would be to limit them only to what is strictly indispensable to guarantee legal certainty following the UK withdrawal. Modifications would thus essentially consist of deletions of references to the departing state from the list of Contracting Parties and from the Annexes and Protocols,<sup>16</sup> as well as necessary adaptations to agreements concluded in the context of the EEA between the EU28 and the EFTA states.<sup>17</sup> Such restrictive reading may be supported by the terminology of Article 127 EEA, which refers to ‘modifications’ rather than ‘amendments’, while characterising those as ‘necessary’, rather than ‘appropriate’.<sup>18</sup>

A broader view would be to construe the envisaged ‘necessary modifications’ more widely, going beyond the above-mentioned adjustments. The reference to ‘diplomatic conference’ suggests that the Contracting Parties themselves will be acting as treaty-makers. They enjoy a wide degree of discretion and should they so wish, they could envisage modifications notably to reflect the content of the withdrawal agreement between the EU and the UK that would be significant for the

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<sup>16</sup> See in this respect the Protocol adjusting the EEA following Swiss non-ratification; it illustrates how references to Switzerland were deleted from the Agreement. The EEA Enlargement Agreements of 2004, 2007 and 2014 could equally offer guidance, though applied in reverse.

<sup>17</sup> e.g. with respect to trade in agricultural products.

<sup>18</sup> It is further arguable that any further substantive change in the sense of broadening or deepening the EEA legal order should rather be introduced through the specific procedure of Art. 118 EEA

functioning of the EEA, including possible transitional arrangements agreed between the EU and the UK.

Several arguments go against such a solution, though. First, any modifications under Article 127 EEA would have to be approved by all Contracting Parties, possibly through national ratification procedures, given the ‘diplomatic’ nature of the conference initiating them. This process of ratification could take time, putting at risk the necessary simultaneous applicability of the modifications in the EU and EEA contexts, respectively.<sup>19</sup> Moreover, there is also a risk that one or several Parties would veto the modifications during the ratification process. Paradoxically, such a procedure could allow an EU Member State to block the introduction of modifications it had not the power to veto in the context of Article 50 TEU.<sup>20</sup>

Second, as the diplomatic conference does not involve the withdrawing state (Article 127 refers to ‘the other parties’), any agreement between the remaining EEA Contracting Parties would not commit the UK. Substantial modifications introduced in the EEA Agreement would thus not be enforceable in the UK. In other words, the diplomatic conference could not guarantee the potential protection in the UK of the EEA-derived rights of Norwegian nationals, equivalent to the protection enjoyed by EU27 citizens deriving from the EU-UK withdrawal agreement.

Thirdly, the incorporation in EEA law of EEA relevant arrangements contained in the EU-UK agreement may not be a matter for the diplomatic conference to address.

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<sup>19</sup> The experience of EEA enlargements could be followed, whereby the agreement could provisionally enter into force, pending its full ratification by the parties.

<sup>20</sup> The question can be asked as to whether the ‘modification agreement’ among the EEA contracting parties would have to be ratified by the EU and all its remaining Member States, or whether it could be done by the EU itself, as with the agreement concluded on the basis of Article 50 TEU and for the purpose of the withdrawal process governed by this provision. The latter has indeed been envisaged in the negotiating directives in the following way: ‘Article 50 of the Treaty on European Union confers on the Union an exceptional horizontal competence to cover in this agreement all matters necessary to arrange the withdrawal. This exceptional competence is of a one-off nature and strictly for the purposes of arranging the withdrawal from the Union. The exercise by the Union of this specific competence in the Agreement will not affect in any way the distribution of competences between the Union and the Member States as regards the adoption of any future instrument in the areas concerned.’

Indeed, and this is the second avenue, guarantees contained in the EU-UK agreement which ought to apply to the whole of the Single Market may rather have to be incorporated through the **EEA institutional framework**. While the withdrawal agreement is not the classic instrument of EU secondary legislation usually incorporated in the EEA, it is still an act of the EU itself.<sup>21</sup> It is negotiated and concluded by EU institutions, and it will be subject to the jurisdiction of the European Court of Justice, which can review its legality, interpret its provisions, and ensure its uniform application. Given that the withdrawal agreement is an EU instrument, there is no need for an international treaty among the EEA Contracting Parties to incorporate EEA relevant aspects of the agreement in EEA law. A decision by the EEA Joint Committee could suffice.

The incorporation of the EEA relevant parts of the EU-UK agreement in the Annexes of the EEA Agreement, through the established EEA decision-making procedure, would have the advantage of ensuring the homogeneous application of the arrangements in the EEA context. For Norway and EEA EFTA states, this method would also involve decision-shaping rights, even if, admittedly, such rights may be less evident to exercise in view of the extraordinary EU procedural framework to adopt the EEA relevant act in question, namely the withdrawal agreement.

It nevertheless remains that the applicability and enforceability of this modified EEA law would need to be accepted by the UK, in order to be enforceable therein. This would presuppose that the UK commits itself to extend the guarantees agreed with the EU to the three EEA EFTA states. Such a bilateral deal would have to remain within the limits of what was agreed between the EU and the UK, and between the EU and the EEA EFTA States.

In conclusion, the two avenues mentioned above (diplomatic conference and EEA institutional framework) to address the implications of the UK withdrawal from the EU would be complementary. Further, they would most likely need to be supplemented by a bilateral agreement with the UK to secure the enforceability of the arrangements they may draw up, e.g. regarding citizen's rights.

The process leading up to such a multifaceted arrangement exposes a long-standing dilemma for Norway and the EEA EFTA States: They are not part of the EU decision-making procedure, yet they implement the

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<sup>21</sup> In contrast to the intergovernmental treaty of accession concluded under Article 49(2) TEU, in turn leading to an intergovernmental enlargement agreement for the purpose of accession to the EEA under Article 128 EEA.



final result of that procedure. As regards the UK withdrawal from the EU, the EEA EFTA States are not party to the Article 50-negotiations, yet they will most likely have to reflect parts of the withdrawal agreement in EEA law, should there be one.

Arguably, this is a challenge for the EU side as well, given the imperative to preserve the integrity of the Single Market during the withdrawal process and beyond. Yet the EU does not have a mandate to negotiate on behalf of the EEA EFTA states. Close consultation and coordination between the EU, the UK and the EEA EFTA States should therefore be in the interest of all parties. It would also reflect the EEA EFTA states' decision shaping rights as regards the elaboration of EEA relevant EU acts.

To be sure, EEA structures have already been used for dialogue in the preparatory stages of the EU-UK withdrawal negotiations. EU Chief Negotiator Michel Barnier thus attended the meeting of the EEA Council on 16 May. The latter indeed underlined the importance of close dialogue and continuous exchange of information:

*With regard to the UK's withdrawal from the EU, the EEA Council underlined the importance of safeguarding the EEA Agreement, and of ensuring the continuation of a well-functioning, homogenous Internal Market in Europe. The EEA Council called for a close dialogue and continuous exchange of information between the EU and the EEA EFTA States on the negotiations between the EU and the UK under Article 50 of the Treaty on European Union regarding the withdrawal of the UK from the EU, and on the future relations between the EU and the UK, as the withdrawal will also affect the EEA Agreement.*

Meetings in the EEA Council usually take place twice a year. Meetings in the EEA Joint Committee are convened six to eight times a year. Given the timeframe and potential speed of the EU-UK withdrawal negotiations, consultations beyond the EEA structures also seem warranted.

Naturally, as non-Member States Norway and the other EEA EFTA States could not be fully integrated in the procedural arrangements for the conduct of negotiations on par with EU Member States. It could however be argued that ad hoc consultations with the EEA EFTA States ought to occur as frequently as envisaged for the Member States, and as simultaneously as possible, at least when negotiations cover EEA relevant matters.

The directives of negotiation foresee that: 'The Union negotiator will in a timely manner consult and report to the preparatory bodies of the

Council. To that end, the Council will organise before and after each negotiating session a meeting of the Working Party on Article 50. The Union negotiator will provide in a timely manner all necessary information and documents relating to the negotiations' (paragraph 46).

Arguably, to contribute to an orderly withdrawal of the UK from the EU and the EEA, the EU could associate the EEA EFTA States to the related discussions within the preparatory bodies, in connection to the meeting of the WP of Article 50 TEU, and provide timely access to relevant information and documents relating to the negotiations. That would also be in line with the requirement of Article 3 EEA, to which the EEA EFTA States, the EU and its Member States are bound.

## 4. Main conclusions

- When leaving the EU legal order, the UK will also have to disentangle itself from EU external agreements, including the EEA Agreement.
- UK withdrawal from the EU automatically entails withdrawal from those parts of the EEA Agreement that are covered by EU law. However, the UK may continue to be an autonomous Contracting Party to the EEA Agreement for areas considered to fall within its competences until it activates the exit procedure, contained in Article 127 EEA.
- Should the UK choose not to activate Article 127 EEA, it could not however expect to remain a full participant in the EEA, as it would no longer be covered by the geographical scope of the EEA Agreement, nor find a place in its institutional framework. The only exception would be if it became EEA Contracting Party qua 'EFTA State'.
- For the UK withdrawal from the EEA is to happen simultaneously with UK withdrawal from the EU, the UK would have to notify the other EEA Contracting Parties early in the process, and at the latest one year after it notified the European Council of its intention to withdraw from the Union.
- Once the UK has notified its intention to leave the EEA, the Contracting Parties shall convene a diplomatic conference to agree on the necessary modifications to the EEA Agreement in the light of the UK withdrawal. Such a 'modifications agreement' would have to be ratified by the Contracting Parties to the EEA Agreement.
- Arguably, Article 127 EEA can only cater for a 'hard brexit' from the EEA, as it does not foresee any negotiations between UK and the other Contracting Parties on the terms of withdrawal. The EEA may however be affected by the terms of withdrawal potentially agreed by the EU and the UK.
- In substantive terms, several matters to be negotiated between the EU and the UK fall within the scope of the EEA, notably citizens' rights and the situation of goods placed on the Single

Market before withdrawal. Differences in the EU-UK regime regarding these issues and their treatment in the EEA EFTA states would entail a fragmentation of the Single Market and infringe the EEA principle of non-discrimination.

- In institutional terms, the governance of the envisaged EU-UK withdrawal agreement raises the need for an equivalent system covering the relations between the EEA EFTA States and the UK. That would arguably be necessary to ensure that any substantive parallelism between the EU-UK agreement and EEA EFTA-UK arrangements is supplemented by a parallel governance system to ensure equivalent interpretation, application, enforcement and potentially development of the norms throughout the EEA.
- Transitional arrangements concerning the Single Market possibly negotiated by the EU and the UK would have a direct impact on Norway and the EEA. Should the EU and the UK agree that the UK would 'remain' in the EEA post-exit on a temporary basis, within the EFTA or the EU pillar, it would require the full involvement and approval of the Contracting parties of the EEA.
- Two main and complementary avenues are available to link the EEA EFTA States to the EEA relevant arrangements potentially agreed by the EU and the UK, thus preserving the integrity of the Single Market: The diplomatic conference envisaged by Article 127 EEA and the EEA institutional framework. Both would likely need to be supplemented by a bilateral agreement with the UK to secure the enforceability of the arrangements they could draw up, e.g. regarding citizens' rights.
- Such a multifaceted arrangement requires close consultation and coordination between the EU, the UK and the EEA EFTA States. Arrangements beyond established EEA structures seem warranted. To be effective and useful, such ad hoc consultations with the EEA EFTA States ought to occur as frequently as for the Member States, and as simultaneously as possible, at least when negotiations would cover EEA relevant matters.



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