COMMON MARKET LAW REVIEW

CONTENTS Vol. 55 No. 1 February 2018

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2018 [Volume 55, 6 issues] including postage and handling:
2018 Print Subscription Price Starting at EUR 851/ USD 1,204/ GBP 607.
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at lnternational-sales@wolterskluwer.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

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Printed on acid-free paper.

COMMON MARKET LAW REVIEW

Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Common Market Law Review **55**: 135–156, 2018.

BREXIT MEANS BR(EEA)XIT: THE UK WITHDRAWAL FROM THE EU AND ITS IMPLICATIONS FOR THE EEA

CHRISTOPHE HILLION*

Abstract

Because it extends the Single Market to the three EFTA States Iceland, Liechtenstein and Norway, the Agreement on the European Economic Area is not an EU external agreement comme les autres. This is particularly salient in the context of the UK withdrawal from the EU. The UK withdrawal will affect the three EFTA States' citizens, businesses and other stakeholders in a way that is comparable to how it will affect citizens, businesses and other stakeholders from the remaining EU Member States. It is thus critical that the two intertwined processes of leaving the EU ("Brexit") and consequently the EEA ("Br(EEA)xit") are closely coordinated if the integrity of the Single Market is to be preserved, in line with EEA rules. The need for coordination between the EU, the UK and the three EFTA States to address the consequences of Brexit for the EEA is a foretaste, albeit specific, of the complex external implications of the UK withdrawal from all other EU external agreements.

1. Introduction

The UK is expected to withdraw from all EU external agreements when it leaves the European Union.[1] Among those, the Agreement on the European Economic Area (EEA)[2] between the EU (and its Member States) and three EFTA States (Iceland, Liechtenstein and Norway; hereinafter "EEA EFTA

* Universities of Leiden & Oslo, Swedish Institute for European Policy Studies (SIEPS), and Norwegian Institute of International Affairs (NUPI). This paper elaborates on a NUPI report commissioned by the Norwegian Ministry for Foreign Affairs. Many thanks to Thomas Ackerman, Marise Cremona, Michael Dougan, Halvard Haukeland Fredriksen, Anne Myrjord, Niamh Nic Shuibhne and Ulf Sverdrup for all their helpful comments on earlier versions of this paper. All mistakes are mine.

1. According to the European Council Guidelines following the UK's notification under Art. 50 TEU (hereinafter, "the Guidelines"): "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"; EUCO XT 20004/17; Brussels, 29 April 2017.
2. Agreement on the European Economic Area, O.J. 1994, L 1/3.

States") stands out.[3] Not only does it include its own specific exit procedure, which may soon have to be activated, but since it essentially extends the Single Market to the three EFTA States,[4] the latter's citizens, businesses and other stakeholders will be affected in a way that is comparable to how citizens, businesses and other stakeholders from the remaining EU Member States will be impacted by Brexit. As will become apparent, it is therefore critical that the two withdrawal processes from the EU and from the EEA, respectively, be closely coordinated if the integrity of the Single Market is to be secured, in line with EEA rules.

Indeed, in examining how Brexit may legally affect the EEA, this paper will not only further illuminate the specificity of the Agreement in terms of the integration it involves of the three EFTA States with the operation of the EU legal order. It may also provide some insights into the potentially far-reaching, and still relatively unaddressed, external implications of Brexit,[5] particularly in terms of having to factor in the views of third States and international organizations in the withdrawal process.[6]

The discussion is structured as follows: a first part provides an analysis of the legal modalities of a State's withdrawal from the EEA. The second part focuses on possible repercussions for the EEA of the ongoing EU-UK withdrawal negotiations and potential agreement, including transitional arrangements. Against this background, the final section envisages legal avenues for the EU, its Member States, and EEA EFTA States to safeguard the

3. These three States are, together with Switzerland, parties to the Convention establishing the European Free Trade Association (EFTA). The text of the Convention is available at <www.efta.int/sites/default/files/documents/legal-texts/efta-convention/Vaduz%20Convention%20Agreement.pdf>, (all websites last visited 8 Dec. 2017). Switzerland did not join the EEA, after a negative referendum on 6 Dec. 1992.

4. On the EEA Agreement, see Opinion 1/91, *EEA (I)*, EU:C:1991:490. Generally, see Nordberg, Hökborg, Johansson and Ehlermann, *EEA Law, A Commentary on the EEA Agreement* (Fritzes, 1993); Baudenbacher (Ed.), *The Handbook of EEA Law* (Springer, 2016); Arnesen, Graver, Fredriksen, Mestad and Vedder (Eds.), *Agreement on the European Economic Area: EEA Agreement – A Commentary* (Nomos/Hart Publishing, forthcoming).

5. The European Council Guidelines merely state that "The Union will continue to have its rights and obligations in relation to international agreements. In this respect, the European Council expects the United Kingdom to honour its share of all international commitments contracted in the context of its EU membership. In such instances, a constructive dialogue with the United Kingdom on a possible common approach towards third country partners, international organizations and conventions concerned should be engaged".

6. In this regard: see the reactions to the Joint letter from the EU and the UK Permanent Representatives to the WTO; e.g. <www.theguardian.com/politics/2017/oct/11/uk-and-eu-formally-inform-wto-of-post-brexit-tariff-quota-plan>.

integrity of the Single Market, and the homogeneity of application of its rules throughout the EEA,[7] pending and after the UK withdrawal.

Because it remains to be negotiated, the *future relationship* between the EU and the UK – and between the latter and EEA EFTA States – is not considered in this analysis, nor are possible implications for the EEA (EFTA States) of a potential UK withdrawal from the EU *without an agreement under Article 50 TEU*.

2. Withdrawal from the European Economic Area

2.1. *Right or obligation?*

The EEA Agreement (EEAA) includes a specific exit clause. According to Article 127 EEA "[e]ach 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".

Concluded on the EU side as a mixed agreement, the EEAA defines the notion of Contracting Parties in its Article 2 as "the Community and the EC Member States, or the Community, or the EC Member States" adding that "[t]he meaning to be attributed to this expression in each case is to be deduced from the relevant provisions of this Agreement and from the respective competences of the Community and the EC Member States as they follow from the Treaty establishing the European Economic Community". The phrase "EFTA States" refers, in the same Article, to "Iceland, the Principality of Liechtenstein and the Kingdom of Norway."

Acknowledged under Article 127 EEA as a *right* of "each Contracting Party" without distinction, exiting the EEA may turn into a *necessity* for a Contracting Party withdrawing from the EU, unless it joins the group of EEA EFTA States.[8] Indeed, several provisions make clear that the EEAA establishes a relationship between two categories of parties: the EU and its Member States, on the one hand, and EFTA States, on the other. For example,

7. Art. 6 EEA. On the principle of homogeneity, see the contribution by Wennerås in Arnesen et al., op. cit. *supra* note 4; Tobler, "One of many challenges after 'Brexit'. The institutional framework of an alternative agreement – Lessons from Switzerland and elsewhere?", 23 MJ (2016), 575–594.

8. The same may be true for an EEA EFTA State withdrawing from the EFTA Convention, without joining the EU and thus the "EU pillar" of the EEA.

its Preamble emphasizes "the high priority [which the contracting parties attach] to the privileged relationship between the European Community, its Member States and the EFTA States" while Article 126 EEA stipulates that the Agreement applies geographically 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", i.e. the three contracting parties referred to as "EFTA States" in Article 2 EEA. This is further illustrated by various EEA substantive rules e.g. on workers,[9] establishment[10] and services[11] and provisions on the EEA institutional framework which includes a Joint Committee that "shall take decisions by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other".

The EEA Agreement thereby makes clear that participation therein presupposes either EU or EFTA membership.[12] The question then arises as to whether, legally, the EEAA stops applying to the UK as a result of Brexit itself, or whether withdrawal from the EEA would still be subject to additional legal steps. In particular, does it presuppose that the UK activates the EEA exit clause? If so, could the UK *remain* in the EEA despite having left the EU so long as it has not notified the other parties under Article 127 EEA?

On one view, the UK is an autonomous Contracting Party to the EEA Agreement *alongside* the EU and its other Member States. Hence its departure from the Union does not immediately prompt its withdrawal from the EEA,[13]

9. Art. 28(1) EEA thus foresees that "Freedom of movement for workers shall be secured among EC Member States and EFTA States."

10. Art. 31(1) EEA: "Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States."

11. Art. 36(1) EEA: "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

12. Indeed, the EEA accession procedure limits further admission to the EEA to European States from the EU or from the EFTA. Art. 128(1) EEA thus stipulates that "Any European State becoming a member of the Community shall, and the Swiss Confederation or any European State becoming a member of EFTA may, apply to become a party to this Agreement. It shall address its application to the EEA Council". Further, see the commentary on this provision in Arnesen et al., op. cit. *supra* note 4.

13. Shroeter and Nemeczek, "The (unclear) impact of Brexit on the United Kingdom's membership in the European Economic Area", 27 EBLR (2016), 921–958.

conceived as a distinct international treaty.[14] To be sure, the EEA being concluded as a mixed agreement, certain aspects thereof are deemed not to be covered by EU law, pertaining instead to Member States' competence, as recognized by Article 2 EEA. Consequently, application of those parts of the Agreement, and cessation thereof, are unaffected by a State withdrawal from the Union. As an autonomous Contracting Party, the UK therefore needs to trigger the procedure of Article 127 EEA to exit from the EEA Agreement.

On another arguably more convincing view, the UK withdrawal from the EU entails its departure from the EEA. By exiting the EU, it will cease to be included in the notion of Contracting Parties under Article 2 EEA, which refers to "EC Member States", and unless it joins the list of "EFTA States" contained in the same provision,[15] the UK will no longer be covered by the geographical scope of application of the EEA Agreement as defined by Article 126 EEA. Being neither EU Member nor EFTA State, the UK could indeed not take part in the EEA decision-making set-up, nor could it be covered by core EEA substantive rules. In sum, it would exclude itself from the operation of the EEA the moment it departs from the Union, which pursuant to Article 50(3) TEU is the moment when the EU Treaties (and the EU *acquis* more generally, including the EEA Agreement) cease to apply to it. This view is also based on the consideration 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 acting as "Member States" together with the EU as a composite entity.[16] The UK is thus unable to *remain* in the EEA after it has exited the EU merely by virtue of formally being a Contracting Party to the Agreement, designed as it is to apply to parties included in either of the two constitutive groups.[17] In sum, Brexit means Br(EEA)xit.

In this case, should the EEA exit procedure nonetheless be triggered? Various elements suggest it should. Considering that Article 127 EEA establishes a specific mechanism for Parties to withdraw from the EEA, one could argue that, like Article 50 TEU in the case of withdrawal from the

14. See Opinion 1/91.

15. On this shift, see discussion further *infra*.

16. Indeed, as mentioned above, para 13 of the European Council Guidelines, foresees that "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). Ultimately, it would be up to the ECJ to determine the meaning of contracting parties under Art. 127 EEA, as applicable in the EU context and thus in relation to the UK as long as it is a member, for the purpose of determining who should notify, and as to whether notification is mandatory in the context of withdrawal from the EU.

17. Sif Tynes and Lian Haugsdal, "In, out or in-between? The UK as a contracting party to the Agreement on the European Economic Area", 41 EL Rev. (2016), 753–765.

Union, it must be activated, whether it is by the UK or by the EU, or both.[18] Indeed, Article 127 EEA, and in particular the word "provided", indicates that withdrawal from the EEA is conditional upon the twelve-months' written notice to the other Parties. Remaining EEA parties thus ought to be formally notified, not least for considerations of legal certainty which all stakeholders deserve, including courts. Moreover, the notification also has significant institutional repercussions, as will be discussed in the next section.

2.2. *Procedure*

As a State cannot be a member of the EU without participating in the EEA,[19] it cannot withdraw from the EEA *before* it leaves the Union. Member States are in principle bound by all EU external agreements, including the EEA Agreement, in line with Article 216(2) TFEU. Similarly, the UK cannot in principle *remain* part of the EEA after it leaves the EU unless it joins the EEA EFTA group, or as discussed below, if its participation in the EEA is prolonged on a temporary basis as part of the post-Brexit transitional arrangement with the EU, and with the EEA EFTA States. Coordination between Brexit (Art. 50 TEU) and Br(EEA)xit (Art. 127 EEA) is therefore critical.

Article 50(3) TEU foresees that the EU Treaties will cease to apply to the withdrawing State from the date of entry into force 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 is not, in principle, set in stone.[20]

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 latter can thus be adapted to fit with the arrangements made in the context of Article 50 TEU. The most practical option would therefore be to notify the other EEA Contracting Parties at the latest one year after the State concerned has notified the European Council of its intention to withdraw from the EU, i.e. on 29 March 2018 in the case of the UK. The Contracting Parties could

18. See further *infra*.

19. Indeed Art. 126(1) EEA foresees that "The [EEA] Agreement *shall* apply to the territories to which the Treaty establishing the European Economic Community …" (emphasis added).

20. Cf. the tabled amendment to the European Union (Withdrawal) Bill introduced in the House of Commons on 13 July 2017, for the purpose of including a specific date (viz. 30 March 2019) on which the UK ceases to belong to the European Union. The European Council Guidelines merely mention that "the two-year timeframe set out in Article 50 TEU ends on 29 March 2019".

then agree that exit from the EEA would be effective on the day of departure from the EU – or, as the case may be, from the Single Market if it were decided that the UK would continue to be part thereof during a transitional period,[21] in which case, the UK could effectively leave the EEA later than it leaves the EU, viz. upon the termination of the transitional period.

As the party intending to depart, the UK should in principle notify the other Contracting Parties to the EEA Agreement.[22] However, in view of the formulation of Article 2 EEA, one could also envisage that the EU itself gives notice, alone or jointly with the UK, considering the limited competence the latter has as Member State in relation to the EEA Agreement.[23] Indeed, it could be the task of the European Commission to notify on behalf of the EU 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".

Unlike Article 50 TEU, Article 127 EEA does not envisage the negotiation of an agreement between the withdrawing State and the remaining EEA Parties to set out the arrangements of its withdrawal from the EEAA. In other words, it only caters for a "hard Br(EEA)xit". Instead, the EEA exit clause foresees that the "*other* Contracting Parties" (emphasis added) convene "a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement". Given that the latter does not provide further details, and in the absence of precedent, the notion of "necessary modifications" remains open to interpretation.[24]

Article 127 EEA is also silent regarding the ratification of the ensuing "modification agreement". Considering that such modifications are to be agreed by a "diplomatic conference", one may assume that they would have to be approved by all the remaining Contracting Parties, in accordance with their own procedures. On the EU side however, one could surmise that Member States be dispensed from taking part in such conference and thus from ratifying the modification agreement at national level if it could be established that the EU has exclusive competence with respect to the matters at hand, in

21. The modalities of such a potential transitional arrangement are further discussed *infra*.

22. It has been argued, based on the decision of the UK Supreme Court in *R (on the application of Miller and another)* v. *Secretary of State for Exiting the European Union* ("*Miller*"), [2017] UKSC 5, that a decision of the UK Parliament would be required to mandate the UK government to activate the procedure of Art. 127 EEA, the way it had to be mandated to trigger the EU exit clause of Art. 50 TEU. Further, "Fresh Brexit legal challenge blocked by high court", *The Guardian* (3 Feb. 2017).

23. This type of joint initiative has already been taken in relation to the WTO: see e.g. Joint letter from the EU and the UK Permanent Representatives to the WTO (11 Oct. 2017), available at <ec.europa.eu/commission/sites/beta-political/files/letter_from_eu_and_uk_permanent_representatives.pdf>.

24. See further *infra*.

view of Article 3(2) TFEU.[25] Whether there is appetite for this type of competence discussion within the EU however remains to be seen.[26]

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

Negotiations of the terms of withdrawal are a key component of the process governed by Article 50 TEU. The EEA EFTA States have a stake in these negotiations insofar as such terms concern matters covered by EEA law, i.e. the Single Market (3.1). Indeed, Parties to the EEA Agreement have a common obligation to preserve its integrity, which in the context of Brexit, may require ad hoc procedural arrangements to ensure compliance (3.2.).

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

Article 50(2) TEU establishes a procedure for the EU to negotiate and conclude a withdrawal agreement with the UK setting the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.[27] Adopted in the context of that procedure, the European Council Guidelines have envisaged a "two-phased approach" to these withdrawal negotiations. In the first phase, the Parties had to address specific "matters … identified as necessary to ensure an orderly withdrawal" (3.1.1.). Only if and when "sufficient progress" was achieved in this first phase, could the European Council decide to proceed to the second phase.[28] Thereupon, the

25. See e.g. Opinion 1/13, *Convention on the civil aspects of international child abduction*, EU:C:2014:2303.

26. Indeed, Member States generally ratify the *accession* protocols for new Member States joining the EEA through a decision of the Council on behalf of the EU and its Member States; arguably the same could apply to a potential amending protocol to cover Br(EEA)xit.

27. Further on Art. 50 TEU, see e.g. Eeckhout and Frantziou, "Brexit and Article 50 TEU: A constitutionalist reading", 54 CML Rev. (2017), 695–733; Łazowski, "Withdrawal from the European Union and alternatives to membership", 37 EL Rev. (2012), 523–540; Hillion. "This way please! A legal appraisal of the EU withdrawal clause" and other contributions in Closa (Ed.), *Secession from a Member State and Withdrawal from the European Union – Troubled Membership* (Cambridge University Press, 2017); see also contributions in Bahurel, Bernard and Ho-Dac (Eds.), *Le Brexit – Enjeux régionaux, nationaux et internationaux* (Bruylant, 2017); Armstrong, *Brexit Time – Leaving the EU – Why, How and When?* (Cambridge University Press, 2017), especially Ch. 15.

28. See, in this regard Complementary Guidelines adopted by the European Council (Art. 50) on 15 Dec. 2017; EUCO XT 2001 1/17 (hereinafter "Guidelines II"); following the Communication from the Commission to the European Council (Art. 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on

parties could discuss the transition and *framework* of the future relationship between the EU and the UK (3.1.2.).[29] As the following discussion indicates, both phases have implications for the EEA.

3.1.1. *First phase of EU-UK withdrawal negotiations*

According to the negotiating directives approved by the EU Council on 22 May 2017,[30] the aim of the first phase of the negotiations was two-fold. First, it purported to "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". Secondly, it aimed to "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".[31]

Several matters covered by these negotiations have significance for the EEA, albeit to a varying degree. Three subjects stand out: *viz*. citizens' rights, goods placed on the market under Union law before the withdrawal date, and the governance of the potential EU-UK withdrawal agreement.

Settling the question of citizens' rights was the first EU priority in phase one of the withdrawal negotiations.[32] Similarly, "securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU" was described as one of the UK government's "early priorities" for the withdrawal negotiations.[33] According to EU negotiating directives, the withdrawal agreement should "safeguard the status and rights derived from

European Union, COM(2017)784 final; Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase I of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27 (hereinafter "Joint Report"); and the European Parliament resolution of 13 Dec. 2017 on the state of play of negotiations with the United Kingdom, P8_TA-PROV(2017)0490.

29. 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. The UK Government agreed to the sequencing envisaged by the EU on the occasion of the first round of negotiations: see e.g. <europa.eu/rapid/press-release_SPEECH-17-1704_en.htm>; <www.theguardian.com/politics/2017/jun/19/uk-caves-in-to-eu-demand-to-agree-divorce-bill-before-trade-talks>.

30. 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 "EU negotiating directives").

31. Para 9, EU negotiating directives.

32. Part III.1, EU negotiating directives. See also Commission's Position paper, *Essential Principles on Citizens' Rights*, TF50 (2017) 1/2, 12 June 2017 (transmitted to the UK), available at <ec.europa.eu/commission/sites/beta-political/files/essential-principles-citizens-rights_en_3.pdf>.

33. UK White Paper, *The United Kingdom's exit from, and new partnership with, the European Union*, 2 Feb. 2017, point 6.3.

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*.[34]

The *persons* concerned by the agreement should essentially be the same as those covered by Directive 2004/38 (i.e. the "Citizens Directive"): hence "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".[35] As to *the rights to be protected*, the negotiating directives mentioned residence rights and rights of free movement as derived from the principle of non-discrimination based on nationality (Art. 18 TFEU), free movement of workers (Art. 45 TFEU), right of establishment (Art. 49 TFEU), and citizenship (Art. 21 TFEU), and as otherwise set out in the Citizens Directive. The document further referred to the rights and obligations on the coordination of social security systems (by reference to 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 members), and the right to take up and pursue self-employment derived from the right of establishment.[36]

Apart from the rules relating specifically to EU citizenship,[37] the above-mentioned EU acts and Treaty provisions also referred to in the Joint Report, are part of EEA law:[38] the right of establishment and the free movement of workers are included in the EEA Agreement itself, while the specific EU secondary legislation that is referred to has been incorporated in its Annexes. As such, these provisions govern the situation of citizens from EEA EFTA States in the UK, the same way they govern the situation of EU citizens there.[39]

Should the EU and the UK thus preserve and protect existing rights of EU27 citizens, as derived from these EU norms, in the UK and *vice versa*, a lack of

34. Part III.1, EU negotiating directives.

35. Para 21, EU negotiating directives, see also TF50 (2017) 1/2, cited *supra* note 32, section II.

36. Ibid.

37. The EU primary rules on citizenship are not part of the EEA Agreement. Most of the provisions of the citizenship directive have however been incorporated. See in this regard, Joint Committee Decision (JCD) incorporating the Citizens Directive into the EEA Agreement, O.J. 2008, L 124/20.

38. See Arnesen et al., op. cit. *supra* note 4.

39. For a recent analysis of those rights in the EEA context: Bierbach, "The reality test of residence goes through the looking glass", 13 EuConst. (2017), 383–399.

corresponding guarantees in the EEA EFTA-UK context would generate differences of treatment among EEA citizens. EU27 citizens having exercised their EU-derived rights in the UK pre-Brexit would continue to enjoy those rights, at least some of them,[40] whereas EEA EFTA citizens having exercised similar EEA rights would not. Indeed, the negotiating directives underlined 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".[41] The principle is indeed recalled in the Joint Report. In view of the principle of non-discrimination applicable throughout the EEA,[42] such EU-UK guarantees should arguably be extended or at least matched by equivalent assurances for EEA EFTA States' nationals in similar situations in the UK (and *vice versa*). Homogeneity in the application of those EEA norms and in the enjoyment of the rights derived therefrom, would otherwise be compromised.[43] In the same vein, should the EU and the UK agree to adjust the scope of application of those norms on the basis of the withdrawal agreement, such an adjustment would arguably have to apply throughout the EEA.

Alongside the issue of citizens' rights, the situation of "goods placed on the market under Union law before the withdrawal date" is another topic of the negotiation that has relevance for the EEA. It is envisaged 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 …"[44] The freedom of movement of goods applies to the EEA. Thus the scope of application of the envisaged guarantees ought to be extended to the EEA EFTA States, or at least matched

40. For an overview of the EU derived rights which both parties have so far envisaged to include in the withdrawal agreement, see the Joint technical note on (8 Dec. 2017) expressing the detailed consensus of the UK and EU positions on citizen's rights, available at <ec.europa.eu/commission/sites/beta-political/files/citizens_rights_comparison_table.pdf>.

41. Para 20, negotiating directives.

42. According to Art. 4 EEA: Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

43. The same holds true as regards the recognition of professional qualifications addressed in para 32 of the Joint Report.

44. Para 31, EU negotiating directives. See also para 90 of the Joint Report and COM(2017)784, cited *supra* note 28, p. 13. See also, EU Position Paper, Goods placed on the Market under Union law before the withdrawal date, TF50 (2017) 7/2, 12 July 2017, available at <ec.europa.eu/commission/sites/beta-political/files/essential-principles-goods_en_0.pdf>.

by an equivalent arrangement, to ensure that the goods concerned are made available not only in the UK and in the EU27, but throughout the Single Market and therefore the EEA. Differences in the EU-UK regime regarding those goods and their treatment in the EEA EFTA States would upset the functioning of the Single Market. That this issue might concern the EEA and not only the EU was seemingly acknowledged, albeit implicitly, 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" (emphasis added).[45]

The third issue that has particular significance for the EEA, is the "governance of the agreement" between the EU and the UK. According to paragraph 17 of the EU negotiation 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 envisaged governance system would go beyond the scope of this paper.[46] Suffice to mention that it raises questions as regards the interface between the application of the potential EU-UK withdrawal agreement and that of any equivalent EEA EFTA–UK arrangements, and as to ways to secure the homogeneous application of EEA law in the context of Brexit.

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,

45. It is indeed remains surprising that the EEA implications of the negotiation do not feature more prominently in the EU official documents dealing with Single Market issues, and including in relation to citizens' rights. The fact that the negotiators have no mandate to negotiate from and on behalf of the three EEA EFTA States might partly explain the silence.

46. On this see EU Position Paper, *Governance*, TF50 (2017) 4, 12 July 2017, available at <ec.europa.eu/commission/sites/beta-political/files/essential-principles-governance_en_0.pdf> and COM(2017)784, cited *supra* note 28, pp. 7–8 and 14.

where it is "necessary for [its] proper implementation".[47] Moreover, surveillance and enforcement mechanisms, involving the European Court of Justice, should ensure homogeneous application of the deal. Were the EU and the UK able to agree to establish such a governance system, its implications for the EEA would have to be considered. In particular, if rights of EU nationals envisaged by the EU-UK withdrawal agreement were to be updated post-withdrawal as a result of internal EU developments, similar updating would be warranted as regards equivalent EEA derived rights of EEA EFTA nationals in a similar situation.[48] In the same vein, the EEA-derived right(s) of e.g. a Norwegian national having worked in the UK pre-Brexit should be protected in the same way as equivalent EU rights of a French national in a similar situation. A comparable enforcement system for relations between the EEA EFTA States and the UK would therefore have to be envisaged, thus complementing the potential EU-UK system.[49]

In other words, the EEA principles of non-discrimination and homogeneity of application of EEA rules require more than equivalent rights for all EEA citizens in *substantive* terms, as argued above. They also entail a corresponding governance system to secure that in the EEA EFTA–UK relations those rights are applied, interpreted, enforced and possibly developed in a similar fashion as in the EU-UK context.

3.1.2. *Second phase of withdrawal negotiations*

As the withdrawal agreement should be negotiated "taking account of the framework for [the UK's] future relationship with the Union",[50] the Guidelines have foreseen that the second phase should identify an "overall understanding on the framework for the future relationship", through "preliminary and preparatory discussions".[51] Paragraph 19 of the EU negotiating directives indicated that *new* sets of directives would be adopted for this second phase, as soon as the European Council decide that "sufficient

47. Para 40, EU negotiating directives.

48. See e.g. the Commission's proposal for a regulation of the European parliament and the Council amending Regulation 883/2004/EC on the coordination of social security systems and Regulation 987/2009/EC laying down the procedure for implementing Regulation 883/2004/EC, COM(2016)815 final. The document underlines its "relevance for the EEA and Switzerland".

49. In this context, one would need to consider the implications for the UK-EEA EFTA relation of the EU-UK understanding that the provisions of the withdrawal agreement dealing with citizens' rights should have direct effect within the respective parties' legal orders.

50. Art. 50(2) TEU.

51. Para 5, Guidelines.

progress towards reaching a satisfactory agreement on the arrangements for an orderly withdrawal".[52]

That said, the EU has been clear that it will not finalize and conclude an agreement with the UK on its future relationship before the latter has formally exited the Union. While the European Council recognized "the need, in the international context, to take into account the specificities of the [UK] as a withdrawing Member State", it has also underlined that the UK must "[respect] its obligations and [remain] loyal to the Union's interests while still a Member".[53] For present purposes, this means that the UK and the EEA EFTA States are unable formally to negotiate, let alone conclude international agreements in fields covered by EU law, and particularly EEA law, as long as the UK remains a member of the EU.[54] Indeed, all EEA participants are bound by a duty of cooperation under Article 3 EEA, which requires that EEA Contracting Parties "abstain from any measure which could jeopardize the attainment of the objectives of this Agreement".[55] However, as the EU and the UK begin their "preliminary and preparatory discussions" on the framework for the future relationship, and once the notification of Article 127 EEA is served, EEA EFTA States could, and perhaps should equally use the second phase of Article 50 negotiations to "scope" their new relations with the post-Br(EEA)xit UK.

Perhaps more importantly for this discussion, the second phase of the negotiations has also considered *transitional arrangements* "[t]o the extent necessary and legally possible".[56] According to the EU, such arrangements should be "clearly defined, limited in time, and subject to effective enforcement mechanisms". It is also envisaged that any time-limited prolongation of Union acquis "requires existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures …

52. Ibid. Following the European Council decision and complementary guidelines, the Commission published its recommendation for a Council decision supplementing the Council Decision of 22 May 2017 authorizing the opening of negotiations with the United Kingdom … for an agreement setting out the arrangements for its withdrawal from the European Union", together with supplementary negotiating directives; COM(2017)830 final.

53. Para 26, Guidelines.

54. For instance, they are unable to conclude bilateral agreements in the field of e.g. civil aviation as long as the UK is an EU Member State, in view of Regulation 1592/2002/EC of the EP and the Council on establishing common rules in the field of civil aviation and creating a European Aviation Safety Authority, incorporated in EEA law by Decisions 179/2004 of the EEA Joint Committee amending Annex XIII (Transport) to the EEA Agreement, O.J. 2005, L 161/1.

55. Further on Art. 3 EEA, see the chapter by Franklin in Arnesen, et al., op. cit. *supra* note 4.

56. Guidelines, paras. 6 and 19, EU negotiating directives.

apply, including the competence of the Court of Justice.".[57] The UK Government has shown some interest in a transitional arrangement, albeit under the ambiguous and slightly misleading name of "implementation period".[58] Thus, in her Florence speech of September 2017, the UK Prime Minister admitted that:

> "during the implementation period access to one another's markets should continue on current terms and Britain also should continue to take part in existing security measures. And I know businesses, in particular, would welcome the certainty this would provide. The framework for this strictly time-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations".[59]

That the potential transitional arrangement should allow *continued* access to "one another's markets … on *current* terms" seems to imply a prolonged application of the Single Market acquis between the parties, in compliance with the conditions set out by the above-mentioned European Council Guidelines. This in effect would also entail a continued application of EEA law.[60] If so, such a transitional arrangement could then take either of the following forms:

One would be that the EU and the UK agree that the latter would temporarily "remain" in the Single Market post-exit by joining the "EFTA pillar" of the EEA. The UK would first have to accede to the EFTA Convention, subscribe to the Agreement among EEA EFTA States on the establishment of a Surveillance Authority and a Court of Justice,[61] and to comply with developing EEA legislation, in line with basic EEA obligations.

57. Guidelines (II), para 4; see also section II of the Commission's proposed supplementary negotiating directives in Annex of COM(2017)830 final, cited *supra* note 52.

58. The notion of "implementation" is consistent with the UK hope that it would conclude a new partnership with the EU by the time of its effective departure therefrom, a partnership that would then be progressively implemented on the basis of an interim arrangement. The "implementation period" is thus envisaged as a *phasing in* arrangement, whereas the notion of transitional arrangement as envisaged by the EU also stands for a *phasing out* period.

59. Theresa May: "a new era of cooperation and partnership between the UK and the EU", Florence, 22 Sept. 2017, available at <www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>. For an incisive analysis of the speech, see Editorial Comments, "Theresa's travelling circus: A very British entertainment trips its way from Florence to Brussels", 54 CML Rev. (2017), 1613–1625.

60. Any alternative transitional arrangement involving a limited or revisited version of current Single Market rules, if at all conceivable in the context of a transitional arrangement, would likely have to be extended or at least matched by an equivalent arrangement in the context of the EEA, in agreement with the EEA EFTA States.

61. O.J. 1994, L 344/3.

Such an arrangement would require the full involvement and approval of the Contracting Parties of the EEA, as well as the agreement of Switzerland to allow the UK to (re)join the EFTA Convention.[62]

If it is to provide a transitional arrangement able to operate from the moment the UK effectively leaves the Union, this set-up seems particularly cumbersome.[63] For such a transfer could take time to materialize, and perhaps longer than the time left under Article 50 TEU to agree on the terms of withdrawal deemed to include that very arrangement. Moreover, joining the EFTA pillar of the EEA could prove legally difficult prior to Brexit unless all Parties concerned accept that discussions for such UK transfer, which entails international negotiations with EFTA States, begin while the country is still a member of the EU. That is not a given considering the EU position that, in principle at least, the UK remains bound by its membership obligations until effective withdrawal, including respect for the competences of the Union, with the implications that this has for the EEA EFTA States, as recalled above.[64]

An alternative and arguably more workable transitional arrangement would be for the EU and the UK to agree that Single Market rules would continue temporarily to apply to the UK as party to the EEA, though not as EFTA State. The UK would instead remain in the *EU* pillar of the EEA as "EC Member State" (as per Art. 2 EEA) for the purpose of the EEAA during the transitional phase, Br(EEA)xit being then postponed to the end thereof, in agreement with the EEA EFTA States. Based on the Guidelines and the EU negotiating directives, this arrangement would entail that the UK accepts the whole body of Single Market rules (considering the "no-cherry picking" principle mentioned in the Guidelines),[65] also as they evolve during the period of transition, and the authority of the EU surveillance and judicial mechanisms, and thus of the Court of Justice, to ensure that EU rules are applied uniformly. The phrases "continue on current terms" and "existing structure of EU rules and regulations" the UK Prime Minister used in her Florence speech could indeed be understood as consenting to those terms,[66] even if it would mean

62. Further, see e.g. Piris, "If the UK votes to leave: The seven alternatives to EU membership", Centre for European reform, 2016.

63. Less so though if the UK were to seek to become part of the EFTA and EEA as the long-term solution.

64. One could however imagine some flexibility on the EU side regarding possible pre-Brexit negotiations if the UK transfer to the EFTA pillar of the EEA was envisaged as the long-term EU-UK arrangement, so as to achieve a smooth transition.

65. Para 1, Guidelines.

66. Indeed the "Withdrawal Bill" as introduced in the House of Commons on 13 July 2017 envisages the incorporation in UK domestic law of Annexes of the EEA Agreement, and Protocol 1 EEA containing horizontal adaptations which apply in relation to EU instruments referred to in the Annexes to the Agreement; see clause 3(2)(b) and (c) of the European Union (Withdrawal) Bill, and point 82 of the related Explanatory Notes.

that the UK accepts being bound by the Single Market rules and governance post-withdrawal without decision-making rights in the EU institutions in line with the EU "core principle" that the autonomy of its decision-making should be preserved.[67] It would also seem to correspond to a Prime Minister statement to Parliament that the UK would have left EU institutions, while remaining bound by their decisions in areas covered by the transitional arrangements,[68] the opposite being tantamount to a prolongation of UK membership, which is subject to the provisions of Article 50(3) TEU.[69]

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

The foregoing suggests that the UK withdrawal from the EU not only entails its departure from the EEA, but that the possible EU-UK terms of withdrawal, including transitional arrangements, will have considerable significance for the EEA. Indeed, unless complementary measures are envisaged to match those terms in the EEA context, the latter's functioning, i.e. the functioning of the Single Market, will be disrupted.

Several elements contained in the European Council Guidelines, the EU negotiation directives and the European Parliament Resolutions testify that the Union and its Member States have been generally aware that Brexit will have significant external implications. Hence, it is recalled that the "main purpose of the negotiations [is] to ensure the United Kingdom's orderly withdrawal so as to reduce uncertainty and, to the extent possible, minimize disruption caused by this abrupt change", and that the first phase of the withdrawal negotiations was intended 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" (emphasis added).[70] In this sense, the negotiating directives further recognized 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 organizations and conventions in relation to the international commitments contracted before the*

67. Guidelines, para 1.

68. Oral statement to Parliament, Prime Minister statement on leaving the EU: 9 Oct. 2017, available at <www.gov.uk/government/speeches/pm-statement-on-leaving-the-eu-9-oct-2017>. This is also the position of the European Council, as per Guidelines (II) para 3.

69. A model that could have been of relevance here is the *observer status* applied to representatives of acceding States in various EU institutions in the period between the signature and ratification of the Accession Treaty.

70. Guidelines, para 4.

> *withdrawal date,* by which the United Kingdom remains bound, as well as on the method to ensure that the United Kingdom honours these commitments".[71]

Of particular importance for EEA EFTA States, both the Guidelines and the EU negotiating directives also emphasized, though without explicitly mentioning the EEA, that the integrity of the Single Market was to be preserved.[72]

In view of this, the question arises about the "possible common approach" of the EU and UK towards the EEA EFTA States "in relation to [EEA] commitments". What kind of arrangements could be set out to preserve the integrity of the Single Market and to ensure the homogeneity of application of its rules throughout the EEA, and how? The final part of this paper will flag up possible modalities, which are likely to operate in a combined fashion considering the diversity of issues to be addressed.

A first way to tackle the implications of the UK withdrawal from the EU on the EEA is the procedure of Article 127 EEA. As recalled above, the provision foresees the convening of a diplomatic conference among the remaining EEA Contracting Parties to introduce the "necessary modifications" to the Agreement, a notion that may be read in different ways.

A narrow view would be to limit those only to what is strictly indispensable to guarantee legal certainty following the UK withdrawal. After all, the provision refers to "modifications" rather than "amendments", while characterizing them as "necessary" rather than "appropriate".[73] 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,[74] as well as ensuing adaptations to agreements concluded in the context of the EEA between the EU28 and the EFTA States.[75]

71. EU negotiating directives, para 18.

72. The European Parliament has been more explicit on the preservation of the EEA. Thus, the "framework for the future EU-UK relationship as part of the Withdrawal Agreement [will be accepted] only if it is in strict concordance with" the principle that "a third country that does not live up to the same obligations as a Member State cannot enjoy the same benefits as a Member State of the European Union *or an EEA member*", while "safeguarding … EU agreements with third countries and organizations, *including the EEA Agreement*" (emphases added), see EP Resolution, cited *supra* note 28, para 8.

73. Indeed, it is arguable that any further substantive change to the EEA Agreement in the sense of broadening or deepening the EEA legal order should rather be introduced through the specific procedure of Art. 118 EEA.

74. On this "cleaning-up" operation, see 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.

75. E.g. with respect to trade in agricultural products.

Another view would be to construe the envisaged "necessary modifications" more widely, hence beyond the above-mentioned technical adjustments. The reference to the "diplomatic conference" suggests that the Contracting Parties themselves will be acting as treaty-makers. They thereby enjoy a wide degree of discretion and should they so wish, they could envisage adjustments notably to reflect the content of the withdrawal agreement between the EU and the UK that would be significant for the functioning of the EEA, including possible transitional arrangements agreed between the EU and the UK.

However, while the diplomatic conference is the appropriate forum for the needed *toilettage* of the EEA agreement as a result of Br(EEA)xit, several arguments go against it for the specific purpose of applying EEA-relevant parts of the EU-UK deal to the EEA EFTA States. First, any modifications under Article 127 EEA would in principle 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 application of the modifications in the EU and EEA contexts, respectively.[76] Indeed, there is a risk that one or several Parties would veto the modifications during the ratification process thereby making it possible, paradoxically, for an EU Member State (and an EEA EFTA State) to block the introduction of adjustments that, formally, it had no ability to veto in the context of Article 50 TEU. Admittedly, the question can be asked as to whether the "modification agreement" among the EEA contracting parties would necessarily have to be ratified by the EU and all its remaining Member States.[77] Such ratification could indeed be carried out by the EU alone if the modifications were considered as pertaining to its exclusive competence.[78]

76. The experience of EEA enlargements could be followed, whereby the agreement could provisionally enter into force, pending its full ratification by the parties.

77. The Member States could also leave the EU act on their behalf too, as in relation to EEA accession agreements.

78. This is not self-evident considering the broad definition of the specific EU competence based on Art. 50 TEU (as per para 5 of the EU negotiating directives): "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". In other words, the exclusive competence that the Union enjoys to conclude the agreement under Art. 50 TEU might not be exclusive outside this context for the purpose of introducing modifications in the context of Art. 127 EEA.

Second, as the diplomatic conference does not in principle involve the withdrawing State (Art. 127 EEA refers to "the other parties"), any agreement between the remaining EEA Contracting Parties could not commit the UK towards the EEA EFTA States. In other words, the diplomatic conference could not guarantee the potential protection in the UK of the EEA-derived rights of EEA EFTA nationals, equivalent to the protection enjoyed by EU27 citizens deriving from the EU-UK withdrawal agreement.

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

Indeed, and this is the second (complementary) avenue, guarantees contained in the EU-UK withdrawal agreement which ought to apply to the whole of the Single Market may rather be incorporated through the EEA institutional framework. While the withdrawal agreement is not a classic instrument of EU secondary legislation usually incorporated in the EEA, it is nevertheless an *act of the institutions*.[79] The latter negotiate and conclude the agreement, and as such, it falls within the jurisdiction of the European Court of Justice, which can review its legality, interpret its provisions, and ensure its uniform application. As the withdrawal agreement is an EU act, there is therefore no need in principle for an international treaty among the EEA Contracting Parties to incorporate relevant aspects of that instrument in EEA law.[80] A decision by the EEA Joint Committee could suffice to incorporate those.[81]

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 indeed have the advantage of ensuring the homogeneous application of the arrangements in the EEA context, monitored as it would thereby be by the classic EEA EFTA surveillance mechanism. Moreover, for EEA EFTA States, this method also entails "decision-shaping" rights[82] even if, admittedly, such rights may be less evident to exercise in view

79. See in this regard, Opinion 1/91, *EEA (I)*. See also Opinion 2/15, *EU-Singapore Agreement,* EU:C:2017:376, which confirms at para 36 that an EU external agreement is an act of the Union.

80. In contrast to the intergovernmental treaty of accession concluded under Art. 49(2) TEU, in turn leading to an intergovernmental enlargement agreement for the purpose of accession to the EEA under Art. 128 EEA. Cf. Sif Tynes and Lian Haugsdal, op. cit. *supra* note 17.

81. It appears that the provisions of Art. 7 EEA, particularly subparagraphs (a) and (b) do not purport to limit the type of EU acts that can be incorporated in the EEA Annexes to EU regulations and directives, but to explain how these two particular types of acts ought to be made part of the legal order of the contracting parties.

82. "Decision shaping" refers to the right for the EEA EFTA States to provide input at various stages of the preparation of EU acts with EEA relevance, e.g. through participation in

of the extraordinary EU procedural framework to adopt the EEA-relevant act in question, namely the EU-UK withdrawal agreement.

That said, the applicability and enforceability of this modified EEA law would need to be accepted by the UK, in order to be enforceable in the UK post-Brexit. This would presuppose that the UK commits itself to extend the guarantees agreed with the EU to the three EEA EFTA States. This could be done by inserting provisions to that effect in the EU-UK withdrawal agreement, on the understanding that the EEA EFTA States would agree to reciprocate those guarantees by their incorporation in the EEA Annexes. Alternatively, the EU-UK guarantees could be *triangulated* by a complementary bilateral instrument between the EEA EFTA States and the UK to secure the enforceability of the arrangements they may draw up, e.g. regarding citizen's rights. Such an additional arrangement, which could take different forms, would specifically have to correspond to what was agreed between the EU and the UK, and between the EU and the EEA EFTA States.

The process leading up to such a multifaceted arrangement indeed exposes a long-standing issue for EEA EFTA States: they are not part of the EU decision-making process, and yet they implement the final outcome.[83] As regards the UK withdrawal from the EU, the EEA EFTA States are not party to the Article 50 negotiations, and yet they will most likely have to reflect parts of the withdrawal agreement – should there be one – in EEA law. Arguably, this is equally a challenge for the EU side, given the imperative to preserve the integrity of the Single Market during the withdrawal process and beyond, while not having the mandate to negotiate with the UK on behalf of the EEA EFTA States. Close consultation and coordination between the latter, the EU and the UK are therefore in the interest of all parties. It would indeed reflect the EEA EFTA States' decision-shaping rights as regards the elaboration of EEA-relevant EU acts.

To be sure, EEA structures have been used for dialogue in the preparatory stages of the EU-UK withdrawal negotiations. Thus, EU Chief Negotiator Michel Barnier attended meetings of the EEA Council, on which occasion the importance of close dialogue and continuous exchange of information was

relevant expert groups and committees of the European Commission – where EEA EFTA experts should be consulted in the same way as EU experts. EEA EFTA States can also submit comments on upcoming EU legislation with EEA relevance. See further: EFTA Bulletin, *Decision Shaping in the European Economic Area*, 1-2009 March, p. 20 et seq.; and Arnesen et al., op cit. *supra* note 4.

83. See e.g. Eriksen and Fossum (Eds.), *Det norske paradoks: Om Norges forhold til Den europeiske union* [The Norwegian Paradox: On Norway's relations to the European Union] (Oslo, Universitetsforlaget, 2014).

underlined.[84] Consultations between the EU negotiators and EEA EFTA officials have also regularly taken place outside the EEA structures.[85] As third countries, the EEA EFTA States cannot be fully integrated in the EU procedural arrangements for the conduct of negotiations on par with EU Member States. Yet as States integrated in the Single Market, their involvement is warranted when negotiations address its underpinning rules to contribute to an orderly withdrawal of the UK from the EU *and the EEA*. 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. Conclusion

The EEA Agreement is not an international treaty *comme les autres*.[86] It extends the Single Market to a group of third European States, viz. the EEA EFTA States. This means that the UK departure therefrom will consequently affect them almost as much as it affects the remaining EU Member States. It also entails that the UK's *orderly* withdrawal from the EU, to which the protagonists of Article 50 TEU aspire, is partly contingent on those States' involvement to ensure that the integrity of the Single Market is preserved in line with EEA rules.

Analysing the legal impact of Brexit on the EEA thus casts a new light both on the degree of integration of EEA EFTA States with the operation of an essential part of the EU legal order, and, more broadly, on the participation of non-EU States in the process of European integration, a subject whose relevance is likely to increase post-Brexit. Br(EEA)xit also typifies, albeit in a highly specific fashion, the complex and potentially far reaching external implications of a Member State's withdrawal from the EU,[87] and provides a clear reminder that EU-UK withdrawal negotiations do not take place in a vacuum.

84. According to the conclusion of the meeting of 16 May 2017: "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 Art. 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"; see <www.consilium.europa.eu/en/press/press-releases/2017/05/16-eea-conclusions/>, para 3.

85. <www.newsinenglish.no/2017/01/26/eus-negotiator-vows-to-defend-eea-deal/>.

86. Case E-9/97, *Erla María Sveinbjörnsdóttir* v. *Iceland*, para 59.

87. In this regard: see again the reactions to the Joint letter from the EU and the UK Permanent Representatives to the WTO; e.g. <www.theguardian.com/politics/2017/oct/11/uk-and-eu-formally-inform-wto-of-post-brexit-tariff-quota-plan>.

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