Brexit, but rEEAmain? The Effect of Brexit on the UK's EEA Membership

Ulrich G. Schroeter, Professor of Law at the University of Mannheim (Germany) and Heinrich Nemeczek, Research Fellow at the University of Mannheim (Germany) and an Academic Visitor at the Law Faculty of the University of Oxford, have authored an article on "'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area". Published in issue 7 [2016] of Kluwer's *European Business Law Review*, pp. 921–958, the authors analyze how the UK's withdrawal from the EU will affect the UK's status as Contracting Party to the EEA Agreement.

The authors have kindly provided us with the following abstract:

> *Until recently, most legal analyses of Brexit have assumed that the UK's EEA membership will be terminated ipso iure should the UK decide to withdraw from the EU. According to this view, the UK subsequently could (re-)apply for EEA membership should its government so choose – an option commonly referred to as the 'Norway option'.*
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> *Our article challenges the assumption that the UK's withdrawal from the EU will automatically result in its withdrawal from the EEA. In short, we reach the conclusion that the UK's EEA membership will continue despite of Brexit unless the UK government chooses to also unilaterally withdraw from the EEA in accordance with Article 127(1) of the EEA Agreement – a step it is not obliged to take. Its continuing EEA membership would mean that many rules of EU law would continue to apply in form of EEA law, including (subject to certain conditions) the much-discussed rules*

about the 'European passport' for UK financial institutions. In contrast, the Court of Justice of the EU would have no jurisdiction over the interpretation of EEA law in the UK. At the same time, the rules governing the free movement of workers are more flexible under EEA law than under EU law, potentially allowing the UK to limit this freedom by way of unilaterally imposed 'safeguard measures'.

In summary, 'Brexit' and 'rEEAmain' are in no way irreconcilable. The result may affect the negotiation positions during the upcoming Brexit negotiations in accordance with Article 50 of the TEU, as a continuing EEA membership could be viewed as an attractive alternative to a 'hard Brexit', for both businesses in the UK and the rest of the EEA.

The EEA Agreement as a 'mixed agreement'

It is an important feature of the EEA Agreement that, on the 'EU side', it neither comprises only the EU nor only its Member States as Contracting Parties, but rather the EU and each of its individual Member States, including the UK. The UK is, therefore, not merely an EEA Member because of its membership in the EU, but because the EEA Agreement's Preamble explicitly lists the UK as a separate Contracting Party. Any modification or termination of this Contracting Party status would require a basis in treaty law.

In this regard, a source of uncertainty is that the EEA Agreement does not contain any specific provision addressing the effect, if any, of a EU Member State leaving the EU. Article 50 of the TEU fails to indicate that a withdrawal from the EU would have any consequence for the withdrawing State's membership in the EEA. As we demonstrate in detail in our article, a 'Brexit' notification in accordance with Article 50 of the TEU can also not be interpreted as also resulting in a withdrawal from the EEA, inter alia because such a result would affect treaty rights of the three EFTA

States within the EEA – Iceland, Liechtenstein and Norway – that are not parties to the TEU.

As far as some provisions in the EEA Agreement only refer to 'EC Member States' and/or 'EFTA States', we argue in some detail that these terms are to be interpreted as referring to EU States and non-EU States within the EEA in accordance with both the EEA Agreement's purpose and past treaty practice under the Agreement.

No Right of Other EEA Contracting Parties to Suspend Operation or Terminate the EEA Agreement in Relation to the UK

The UK's withdrawal from the EU does not entitle other EEA Contracting Parties to suspend operation or terminate the EEA Agreement in relation UK, neither under the EEA Agreement nor under customary public international law. Under customary treaty law as codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), the UK for once has committed no 'material breach' of the EEA Agreement (Article 60 of the VCLT), as Brexit is merely the use of a right explicitly granted to the UK by a different treaty, namely Article 50 of the TEU. Also, Brexit does not constitute a fundamental change according to the clausula rebus sic stantibus doctrine enshrined in Article 62 of the VCLT as the EEA Agreement's core elements can still be performed. Although the UK's withdrawal from the EU will create certain difficulties because the country's representation in organs like the EFTA Court or the EFTA Surveillance Authority requires clarification, these changes neither radically modify the obligations still to be performed under the EEA Agreement nor imperil the existence or vital development of other EEA Contracting Parties.

Post-Brexit situation ('rEEAmain')

In our article, we further outline the consequences that

Brexit would have for the future application of the EEA Agreement. Because the UK's Contracting Party status would remain unaffected, UK companies would still have access to the EEA internal market. Inter alia, the legal capacity of UK companies with their 'real seat' elsewhere within the EEA would continue to be recognised in all other EEA States under the EEA Agreement's freedom of establishment. The same would, of course, apply in the 'opposite direction', giving continued freedom of establishment in the UK for companies from elsewhere in the EEA.

The freedom of movement for workers under Article 28 of the EEA Agreement may be unilaterally limited by the UK by way of appropriate safeguard measures in accordance with Article 112 of the EEA Agreement (e.g. a quota system), if 'serious economic, societal or environmental difficulties' are arising – a possibility that does not exist under EU law. (It is foreseeable that the interpretation of the legal prerequisites will give rise to disputes.) In any case, safeguard measures taken by the UK may come at a price, as other EEA Contracting Parties would be authorized to take proportionate 'rebalancing measures' in order to remedy any imbalance between rights and obligations under the EEA Agreement created by the safeguard measures.

Our interpretation should not be misunderstood as indicating that no difficulties would arise under a 'rEEAmain' scenario. Such difficulties would indeed appear, primarily because certain institutional arrangements in the EEA Agreement and related agreements do not explicitly envisage an EEA Contracting Party that is neither a member state of the EU nor of the EFTA. If the UK does not accede to the EFTA Agreement and the Surveillance and Court Agreement, EEA law within the UK would have to be supervised and interpreted solely by British domestic courts and authorities. Also, the issue of financial contributions by the UK would arguably necessitate a renegotiation of protocols to the EEA

Agreement: After Brexit, the UK will no longer contribute to the EU budget, but neither Article 116 of the EEA Agreement nor Protocols 38–38c explicitly provide for an obligation of the UK to contribute to the EEA Financial Mechanism. As it is difficult to argue that the UK would profit from its continuing EEA membership without contributing to the connected Financial Mechanism, the exact amount of the UK's contribution would need to be fixed through an adjustment of the Protocols 38–38c.