Hard, Soft and now Smart Brexit? Leaving the EU but not the EEA, Is it that Simple?

Posted on November 29, 2016 by Noelle Quenivet

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On 28 November 2016 the think tank British Influence announced that it will write to the Secretary of State for Exiting the European Union, Rt Hon David Davis MP, to find out what is the position of the UK government regarding its membership to the Agreement on the European Economic Area (EEA Agreement). In particular, British Influence contends that ‘[l]eaving the European Union does not necessarily mean we automatically leave the EEA – and thus the single market’ (website, 28/11/2016). In contrast, the British government is alleged to have argued that

‘As the UK is party to the EEA Agreement only in its capacity as an EU Member State, once we leave the European Union we will automatically cease to be a member of the EEA’. (The Independent, 28/11/2016).

The issue is not as simple and straightforward as claimed by any side of the debate.

The 1993 EEA Agreement is a mixed agreement of association between the then European Community (now EU), the Member States of the EU and three of the four Member States of EFTA, Iceland, Liechtenstein and Norway. Mixed agreements are treaties concluded by third parties, on the one hand, and the EU and its member states, on the other on the basis that they cover elements of both EU and Member State competences.

The purpose of the EEA Agreement is to create a homogeneous ‘European economic area’ bringing together the EU Member States and EEA EFTA States into a single market within which equal conditions of competition are ensured and competition rules are respected (see Preamble and Article 1 of the EEA Agreement). Through this Agreement EU legislation on the Single Market four freedoms (goods, persons, services and capital) applies to the 31 EEA States. Further, the Agreement provides for ‘horizontal provisions’ relevant to the four freedoms (social policy, consumer protection, environment, statistics and company law) and, outside the four freedoms, for further cooperation in so-called ‘flanking’ policies in areas such as research and development, environment, education, tourism and civil protection. However, the Agreement does not cover certain EU policies (eg Customs Union, the Common Trade Policy and the Common Foreign and Security Policy).

Often, being a party to the EEA Agreement is viewed as a first step towards accession to the EU. The EEA acts therefore as an antechamber to EU membership as was the case for Austria, Finland and Sweden.

The UK is currently a Contracting Party as defined under Article 2 of the EEA Agreement which specifies that “‘Contracting Parties” means […] the Community and the EC Member States, or the Community, or the EC Member States’. After the UK leaves the EU, the UK would logically no longer fulfil the requirements of being party to the Agreement as Contracting Parties to the EEA Agreement must be either Member States of the EU or EFTA. However, it is unclear whether the UK would automatically be withdrawn from the EEA Agreement as the latter does not specifically provide for the situation where an EU or an
EFTA State leaves its organisation (see also opinion of George Yarrow as cited in BBC, 28/11/2016). The formal mechanism of withdrawal from the EEA Agreement is specified in Article 127. It obliges the UK, as a Contracting Party, to give at least 12 months’ notice in writing to the other Contracting Parties.

What complicates matters is the fact that Article 50 TEU provides that the agreement on the withdrawal from the EU takes also into account the framework of the future UK-EU relationship. There are then three options with regard to the EEA Agreement: (1) the UK wishes to remain an EEA Contracting Party, (2) it withdraws from the EEA Agreement and (3) it takes no action.

(1) Should the UK wish to remain a Contracting Party it would only be able to do so as a member of EFTA since the EEA Agreement is, as Michael Dougan rightly states, ‘premised on its contracting parties being either a Member State of the EU or a member of EFTA’ (Liverpool View, 28/11/2016). More importantly, this wish to remain a party to the EEA Agreement would need to be specified either in the UK-EU withdrawal agreement or/and in the framework agreement for the new UK-EU relations. Negotiations for EFTA membership would then need to commence as soon as possible to provide a smooth transition from EU to EFTA membership so as to continue its EEA Agreement membership. In the meantime, the EEA Agreement might provisionally apply to the UK until its status as an EFTA Member State is confirmed (by analogy, the EEA Agreement applies provisionally to Croatia although the EEA Enlargement Agreement has still not entered into force).

(2) Should the UK wish to withdraw from the EEA Agreement, it would have to trigger the Article 127 procedure by giving notice to the EEA Contracting Parties of its intended withdrawal. The difficulty here resides in the timing of the 12 months’ notice so as to synchronise the withdrawal from the EEA Agreement with the withdrawal from the EU. Ideally, the EU-UK withdrawal agreement should specify that the UK leaves the EEA Agreement on the same day as it leaves the EU. If the 12 months’ notice goes beyond the withdrawal date of the UK from the EU then the doctrine of rebus sic stantibus of public international law could apply (see below). If the 12 months’ notice ends before the UK leaves the EU then the EEA Agreement would cease to apply before the EU treaties cease to apply to the UK, thus leading to a potential conflictual situation with regards to UK’s obligations. Having recovered its competences over matters that were within the exclusive and shared competence of the EU as a result of withdrawal from the EU, it is unclear under which conditions the UK would have to comply with the provisions of the EEA Agreement relating to matters which are exercised collectively at EU level (eg custom duties and single market rules). What is clear however is that the UK would still have to comply with the provisions of the EEA Agreement that fall within the areas where Member States had retained their sovereign powers (eg ‘flanking’ policies’) until withdrawal from the EEA Agreement is effective. That being said, it is extremely difficult to extricate the mixed from the ‘EU-only’ elements in the EEA Agreement. As according to Article 2 of the EEA Agreement the term ‘Contracting Party’ has ‘to be deduced from the relevant provisions of [the] Agreement and from the respective competences of the [EU] and the [EU] Member States as they follow from the [TEU and TFEU]’ this means that the UK obligations as a Contracting Party in its own right would have to be extricated from each relevant provision of the EEA Agreement and notably from the TEU (Articles 4(1) and 5(1-2)) and TFEU (Articles 3-6) provisions relating to the competences of the EU. This might prove to be an extremely difficult task to perform and thus reinforces the need for the UK and the EU to specify also in the withdrawal
agreement and/or the framework agreement for the UK-EU future relations the remaining UK’s obligations with regard to the EEA Agreement.

(3) The crux is whether there is an obligation to trigger Article 127 of the EEA Agreement. Some scholars argue that the only option for the UK to withdraw from the EEA Agreement is to use the procedure under Article 127 (see George Yarrow, Brexit and the Single Market, July 2016; Michael Dougan in Liverpool View, 28/11/2016). The UK government on the other hand goes on the premise that EU membership and being a party to the EEA Agreement are inextricably intertwined and interdependent. This position is incorrect as the UK is also a party to the EEA Agreement in its own right since the Agreement is a mixed agreement. As argued by Kenneth Armstrong, once the UK leaves the EU it still has obligations, although limited, under the EEA Agreement (Website, 28/11/2016, see also Michael Dougan in Liverpool View, 28/11/2016). As pointed out by Dougan, the UK would be unable to carry out its obligations under the EEA Agreement as Article 126(1) stipulates that the territorial scope of application of the Agreement is the territories to which the TEU and TFEU applies (and the territories of the EEA EFTA States) and this would no longer include the UK territory (Michael Dougan in Liverpool View, 28/11/2016).

Should the UK fail to invoke Article 127 of the EEA Agreement on the premise that leaving the EU equates to leaving the EEA Agreement the principle of rebus sic stantibus (Article 62 of the Vienna Convention on the Law of Treaties (VCLT)) could apply. Two conditions must be fulfilled (see Article 62 VCLT; Case C-162/96, Racke, 16/06/1998 para 53). First, the circumstances that existed at the time of the conclusion of the EEA Agreement would have fundamentally changed. This would be the case here as the UK originally joined the EEA Agreement as an EU member State and the UK’s obligations and rights as a non-EU Member State would be radically different from the ones it had as an EU Member State. Second, at the time of the signature of the EEA Agreement in 1993 the possibility of a withdrawal of an EU Member State from the EU could not have been contemplated since Article 50 TEU was only introduced in the Lisbon Treaty in 2009. As a result of the application of this principle, the EEA Agreement would become inapplicable to the UK. However, this legal mechanism needs to be invoked by a party to the treaty (see Article 65 VCLT which is however not of customary nature and thus not binding upon the EU (see Case C-162/96, Racke, 16/06/1998 para 59 in light of para 45)). It would only make sense for the UK to use it. In other words the UK would need to take action one way or the other, ie either trigger the Article 127 EEA Agreement procedure or notify the parties to the EEA Agreement that it invokes the rebus sic stantibus clause. The European Union would not be able to force the UK out of the EEA Agreement by using this legal mechanism. Again, it would be judicious for the UK and the EU to settle the matter in either the withdrawal agreement and/or the framework agreement for the UK-EU future relations.