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SPICe Briefing

Pàipear-ullachaidh SPICe

European Economic Area Membership

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This briefing provides information on European Economic Area (EEA) membership. It provides details of how States can join the EEA, the requirements of membership and details of the EEA's institutional and legal set-up.



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Executive Summary

Following the UK's decision to leave the European Union, there has been discussion about EEA-EFTA membership, both as a transitional arrangement for the UK upon leaving the EU and for an independent Scotland as a stepping stone towards EU membership.

EEA-EFTA membership would mean membership of the European Single Market and would incorporate many of the same provisions and obligations of EU membership, including the four freedoms. However, it does not incorporate membership of the Customs Union or the Common Agricultural Policy and Common Fisheries Policy. In addition, EEA-EFTA membership does not require membership of the Eurozone.

EEA-EFTA membership does not bring a member state under the jurisdiction of the Court of Justice of the European Union, but it does require EEA-EFTA national courts to take notice of (but not be bound by) EFTA Court rulings. In addition, the EEA Joint-Committee exists to ensure homogeneity between EU law and the EEA Agreement.

Whilst EEA-EFTA members are required to observe EU law (especially around the four freedoms) they cannot take part in the formal process of agreeing that law. Members can participate in working groups and are consulted on legislation but, ultimately, legislation is agreed within the institutions of the European Union.

Norway's experience of EEA-EFTA membership is that the economic benefits of membership of the Single Market are positive and outweigh the negative aspect of being a rule-taker rather than a rule-maker.

Introduction

In considering options for the UK following its departure from the European Union, the idea of retaining membership of the European Single Market has been proposed. Retaining membership of the Single Market could be achieved by the UK joining the European Free Trade Association (EFTA) and then resuming membership of the European Economic Area (EEA). Membership of the Single Market would allow the UK to retain tariff free trade in goods and services with the EU. In addition, Single Market membership means the same standards and regulations are in place across all EEA Member States. EEA membership would also require the UK to continue to observe the four freedoms - the freedom of movement of goods, services people and capital across borders.

Alongside being an option for the whole of the UK, post-Brexit, the Scottish Government's proposals in Scotland's Place in Europe ¹ (published in December 2016) proposed that Scotland could remain within the EEA, and consequently the European Single Market, even if the rest of the UK chooses to leave.

In recent weeks there have also been reports that in the event that Scotland votes for independence in the future, it might seek EEA-EFTA membership, possibly as a stepping stone to EU membership.

It has also been suggested that as part of the process for the UK leaving the EU, a transitional arrangement between leaving the EU and conclusion of a new Free Trade Agreement could see the UK adopt many of the provisions and obligations of the EEA Agreement.

This briefing provides information on membership of the European Economic Area, including details of the terms and obligations of membership. Members of the EEA who are not members of the European Union first need to join the European Free Trade Association which then provides a route to EEA membership.

The European Free Trade Association

The European Free Trade Association (EFTA) is an intergovernmental organisation set up for the promotion of free trade and economic integration to the benefit of its four Member States – Iceland, Liechtenstein, Norway and Switzerland.

Joining EFTA

Article 56 of the EFTA Convention sets out the procedure for a country to join the European Free Trade Association (EFTA)². Article 56 states:

Accession and association

1. Any State may accede to this Convention, provided that the Council decides to approve its accession, on such terms and conditions as may be set out in that decision. The instrument of accession shall be deposited with the Depository, which shall notify all other Member States. This Convention shall enter into force in relation to an acceding State on the date indicated in that decision.
2. The Council may negotiate an agreement between the Member States and any other State, union of States or international organisation, creating an association embodying such reciprocal rights and obligations, common actions and special procedures as may be appropriate. Such an agreement shall be submitted to the Member States for acceptance and shall enter into force provided that it is accepted by all Member States. Instruments of acceptance shall be deposited with the Depository, which shall notify all other Member States.
3. Any State acceding to this Convention shall apply to become a party to the free trade agreements between the Member States on the one hand and third states, unions of states or international organisations on the other.

In essence, a country which wishes to join EFTA would require the agreement of all four EFTA States – Norway, Iceland, Liechtenstein and Switzerland – and would be required to take on the obligations set out in the EFTA Convention and the Annexes and Protocols.

The purpose of EFTA

When it was established in 1960, the immediate aim of the Association was to provide a framework for the liberalisation of trade in goods amongst its Member States. EFTA was also established as an economic counterbalance to the more politically driven European Economic Community (EEC). In the 1970s, the EFTA States concluded free trade agreements with the EEC; and in 1994 the European Economic Area Agreement entered into force.

The European Economic Area and the EEA Agreement

The European Economic Area (EEA) is currently made up of the 28 EU Member States and three other countries, Norway, Iceland and Lichtensteinⁱ. All EEA countries are part of the Single Market; however, non-EU EEA countries (Norway, Iceland and Lichtenstein) are not part of the EU Customs Union. Norway, Iceland and Lichtenstein have an independent trade policy, which means they negotiate their own trade agreements outside the EEA.

European Economic Area

What is it?	Free trade area covering EU states, Norway, <u>Lichtenstein</u> and Iceland
What are the requirements?	UK needs to join European Free Trade Association (EFTA) and then the EEA
Whose approval is required?	<ul style="list-style-type: none"> All EFTA states (Iceland, Liechtenstein, Norway and Switzerland) to join EFTA All the EEA states to join EEA
What stays the same?	<ul style="list-style-type: none"> Some financial contribution to EU Free movement of people Application of Single Market rules and regulations
What changes?	<ul style="list-style-type: none"> No customs union EU agricultural and fisheries policies excluded UK would not have a vote on Single Market rules and regulations UK would not be party to trade agreements that the EU negotiates with other parties

Joining EEA

Article 128 of the EEA Agreement outlines how a new member would join the EEA. It states 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. The terms and conditions for such participation shall be the subject of an agreement between the Contracting Parties and the applicant State. That agreement shall be submitted for ratification or approval by all Contracting Parties in accordance with their own procedures. ³ ”

As with EFTA membership, any country wishing to join the EEA would require the unanimous agreement of all EEA members and would be required to take on the obligations set out in the EEA Agreement.

ⁱ Switzerland, also a member of EFTA, chose not to sign up to the EEA Agreement and has negotiated a number of bilateral agreements with the EU instead.

What are the rules of EEA membership?

Members of the EEA must comply with the EEA Agreement and be subject to the EEA's institutional framework which, for the three EFTA members, includes the EFTA Court and Surveillance Authority (discussed in more detail later in the briefing). The EEA Agreement provides for the inclusion of EU legislation covering the four freedoms – the free movement of goods, services, persons and capital – throughout the 31 EEA States.

The EEA Agreement also covers cooperation in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as “flanking and horizontal” policies. It also guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA ⁴ .

Membership of the EEA also requires non-EU members to incorporate most EU law related to the Single Market into domestic legislation. This legislation needs to be incorporated despite the non-EU EEA members having little say in its development other than in a consultative role.

The consultative role allows input from EEA-EFTA States during the EU's legislative process for EEA relevant legislation. The first opportunity for input is by participating in expert groups and committees of the European Commission; this stage means the European Commission can contact EEA-EFTA officials in the same way it would speak with EU member state officials in the development of legislation. The EEA-EFTA States can also participate in Commission consultations on upcoming EU legislation. Whilst the EEA-EFTA States have this opportunity to exert influence, they have no role in the EU's legislation making bodies - the Council and the European Parliament. EEA-EFTA States, therefore, are often portrayed as rule-takers rather than rule-makers.

EU Legislation and the EEA Agreement

The EEA Agreement is based on the EU legislation that was in force at the time of the EEA Agreement coming into force. As a result, the EEA Agreement mirrors EU law in relation to the four freedoms. The EEA Agreement also provides that the EEA-EFTA States must ensure their national law is in compliance with the rules set out in the EEA Agreement. According to EFTA:

“ The legal texts of the EEA Agreement consist of 129 articles, 22 annexes, 49 protocols and a final act. The annexes list the EU acts applicable to the EEA, including adaptations. Some of the protocols include provisions on specific areas such as rules on the origin of goods, transition periods for the EEA - EFTA States in certain fields and simplified customs procedures. Protocol 1 contains horizontal adaptations, which apply to all acts referred to in the annexes to the EEA Agreement. Protocol 31 provides the basis for cooperation outside the four freedoms, and on that basis the EEA-EFTA States contribute financially to and participate in various EU programmes. Finally, on the basis of Protocol 35, the EEA-EFTA States have undertaken to introduce in their national legal order, if necessary, a statutory provision to the effect that EEA rules prevail in the case of a conflict with other statutory provisions. ⁵ ”

As EU law develops, the EEA agreement provides for EU acts to be incorporated into the EEA Agreement. This is done by a Joint Committee Decision (JCD):

“ After an EU act has been adopted, the EFTA experts in the EEA-EFTA States analyse whether the act is EEA relevant and, if so, whether any adaptations are required in the JCD for incorporation into the EEA Agreement and whether there are likely to be any constitutional requirements (see point 14 for more on constitutional requirements). An act is considered EEA relevant when its content concerns an area covered by the EEA Agreement. Once the EFTA Secretariat has received feedback from all three EEA-EFTA States concerning these issues, it drafts a JCD. When the draft JCD has been cleared both by the EFTA experts and by the relevant subcommittee, it is handed over to the EEAS, which initiates an inter-service consultation in the Commission. Once the Commission has agreed on the draft JCD, it is sent to the Council of the European Union for adoption if it contains substantial adaptations, otherwise the EU’s position is adopted by the Commission. The EFTA Secretariat and the EEAS then consult on the timing of adoption in the EEA Joint Committee, and when all Contracting Parties are in agreement the EEA Joint Committee adopts the JCD ⁵ .”

Once a piece of EU law has been incorporated into the EEA Agreement, it is the responsibility of each EEA-EFTA State to transpose and implement the legislation domestically. Failure to successfully to transpose and implement legislation may lead to action by the EFTA Surveillance Authority and ultimately the EFTA Court ⁶ .

Derogations from the EEA Agreement

Article 102(4) of the EEA Agreement allows EEA-EFTA countries to refuse to implement EU legislation. In practice, choosing to invoke Article 102(4) rarely happens as the EU would likely suspend the affected part of the EEA Agreement.

The EEA Agreement also includes a number of ‘safeguard measures’ under Article 112 which can be triggered in the event of “serious economic, societal or environmental difficulties”, allowing the EFTA States to depart temporarily from agreed EEA rules. Invoking Article 112 requires the EFTA countries to enter into negotiations with the EU in order to find a “commonly acceptable solution”.

Analysis by O'Brien and Pech for the EU Law Analysis blog suggests that, whilst Article 112 of the EEA Agreement is an option for restricting freedom of movement, it is unlikely it'd be used as it would likely result in counter measures:

“ Assuming that the UK aims and is able to remain part of the EEA after its eventual exit from the EU, triggering this provision with the view of limiting EEA labour immigration to the UK would not however be cost-free. Indeed, and to the best of our knowledge, none of the contracting parties to the EEA has ever done so with respect to labour immigration if only because another provision of the same agreement entitles parties negatively affected by safeguard measures to take ‘proportionate rebalancing measures’. In other words, should the UK as an EEA member trigger this provision in order to impose quantitative limitations or restrictive rules regarding entry, residence and employment of EEA nationals in the UK, it could be subject to what would essentially be retaliatory measures focusing for instance on UK banks’ passporting rights (i.e. rights derived from EU law which enable banks based in the UK to offer financial services to the rest of the EEA without having to follow the regulations of the countries where they are offered). Furthermore, the UK would have to accept that any dispute in this context may be referred to an arbitration panel ⁷ ”

Lichtenstein has managed to agree restrictions on free movement (this is set out in the box below), however, according to O'Brien and Pech, Liechtenstein's approach to free movement is not directly based on Article 112 of the EEA Agreement.

When Liechtenstein (population 36,000) joined the EEA in 1995, the EEA Council recognised that:

“Liechtenstein has a very small inhabitable area of rural character with an unusually high percentage of non-national residents and employees. Moreover, it acknowledges the vital interest of Liechtenstein to maintain its own national Identity.”⁸”

As a result the EEA Council agreed that:

“in the context of the review of the transitional measures provided for in the Agreement, account should be taken of the elements which, according to the Declaration by the Government of Liechtenstein on the specific situation of the country, might justify the taking of safeguard measures by Liechtenstein as provided for in Article 112 of the EEA Agreement, i.e. an extraordinary increase in the number of nationals from the EC Member States or the other EFTA States, or in the total number of jobs in the economy, both in comparison with the number of the resident population. In addition, the possible implications of the delayed entry into force of the EEA Agreement for Liechtenstein shall be taken into account. Furthermore, the Contracting Parties shall in case of difficulties endeavour to find a solution which allows Liechtenstein to avoid having recourse to safeguard measures. It is understood that an equal treatment must be ensured for the nationals of the States, Contracting Parties to the EEA Agreement, and that only the increase in the number of nationals of the above States should be taken into account in the review.”⁸”

As a result of this agreement, Protocol 15 was added to the EEA Agreement allowing Liechtenstein to impose restrictions on the free movement of persons from the other EEA member States until 1 January 1998⁹. As no progress was made in agreeing a more long term solution, Liechtenstein took the decision to unilaterally activate safeguard measures (permitted under Article 112 of the EEA Agreement). As a result of this, the EEA amended its agreement (see Annex VIII of the EEA Agreement) to allow Liechtenstein to introduce an immigration quota system that would be reviewed every five years. The system remains in place, having been reviewed twice (in 2009 and 2015). Liechtenstein's ability to impose a quota has to a large degree come about because of the EEA Council's original recognition (in 1995) of its “very small inhabitable area of rural character with an unusually high percentage of non-national residents and employees”.

What is not covered by the EEA agreement?

The EEA Agreement does not cover a number of EU policies. For instance, EEA membership does not require participation in the Common Agricultural Policy and the Common Fisheries Policy. In addition, EEA membership does not include membership of the EU's Customs Union. The list of EU policy areas not covered by the EEA agreement are:

- Common Agriculture and Fisheries Policies (although the Agreement contains provisions on various aspects of trade in agricultural and fish products);
- Customs Union;
- Common Trade Policy;
- Common Foreign and Security Policy;
- Justice and Home Affairs (even though the EFTA countries are part of the Schengen area); or
- European Monetary Union.

Outside the Common Agricultural and Fisheries Policies

EEA-EFTA countries do not participate in either the Common Agricultural Policy (CAP) or the Common Fisheries Policy (CFP). This allows each EEA-EFTA State to make its own decisions about the level of subsidies it wishes to provide to its agricultural and fisheries industries within the context of international rules such as those of the World Trade Organisation.

Being outwith the CAP and CFP also means agricultural and fisheries products from Norway, Iceland and Lichtenstein are not sold to the Single Market tariff free. Despite not participating in the Single Market for agriculture and fisheries, the EEA-EFTA countries continue to comply with a number of EU Regulations and Directives in these areas, such as food standards and veterinary products, this compliance allows businesses in Norway, Iceland and Lichtenstein to sell goods into the Single Market albeit with tariffs applied.

Giving evidence to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee on 17 November 2016, Tore Myhre, Director of the Confederation of Norwegian Enterprise, said:

“ Agricultural policy and the tariffs that protect Norwegian agriculture are outside the EEA because of our climate and harsh conditions. Part of the national compromise when we negotiated the EEA was that fisheries and agriculture would be outside it, and that means that we have our own customs policy. It is interesting that, in the years that have followed, all the legislation on standards and veterinary products have become part of the EEA agreement. That is the biggest part of the regulations that we take in, and many are related to food safety standards so that we can sell our products freely. The main reason for fisheries and seafood being outside the agreement was the concerns of our fishermen, who were afraid of EU fishermen coming in and taking Norwegian fish quotas. However, the consequence is that the development of our fish farming industry in the sea is also outside the agreement, which means that we do not have free trade of seafood and fish to the European Union. That is a tremendous hurdle for us because it means that we have a number of quotas and tariffs depending on the species of fish. In addition, as Dr Sverdrup mentioned, the more processed the product is, the higher the tariffs. In retrospect, therefore, it was a bad choice for Norway to have seafood outside the EEA agreement, but that is how it is.”

Culture, Tourism, Europe and External Relations Committee 17 November 2016, Tore Myhre, contrib. 48¹⁰

Exporters of fisheries and agricultural products to the EU, where no preferential trade deal is in place, would be required to pay the European Union's Most Favoured Nation (MFN) tariff rates to export goods. World Trade Profiles for 2016 produced jointly by the World Trade Organisation, the International Trade Centre and the United Nations Conference on Trade and Development provides information on MFN tariff rates for the EU. These rates are shown in the table below.

The EU's current Most Favoured Nation Tariffs for agricultural and fisheries products ¹¹

Product Group	Average MFN Applied Duties
Agricultural products	10.7%
Animal products	15.0%
Dairy Products	33.5%
Fish and Fish products	12.0%
Fruit and vegetables	10.3%

World Tariff Profiles 2016 show that Norway's export of agricultural products to the European Union attracted a simple average MFN tariff of 16.1% and a weighted tariff of 6.6%ⁱⁱ. These tariffs are as a result of Norway's preferential trade deal with the EU in these sectors.

Outside the Customs Union

EEA-EFTA members are not members of the EU's Customs Union. The Customs Union applies a common tariff to all goods entering from outwith the EU. As a result of this common tariff, individual Member States are unable to adopt their own independent trade

ii The simple average tariff is calculated by giving the same weight to all products without taking account of the quantity of products exported whilst the weighted tariff takes account of the products with larger export flows to the EU.

policies and apply a common external tariff. As a result of the Common External Tariff, the EU has competence for negotiating trade agreements on behalf of the Member States.

As those EEA members who are not members of the EU are outwith the EU's Customs Union, they are able to negotiate their own trade policies with non-EEA countries. Absence from the Customs Union does mean that customs controls are required at borders between EU Member States and EEA-EFTA members, for example, the border between Norway and Sweden. The customs checks exist to ensure goods are not using an EEA-EFTA member as a point of entry to the Single Market unlawfully. This issue was addressed in the UK Government's publication "Alternatives to membership: possible models for the United Kingdom outside the European Union" which was published before the EU referendum and states:

“In a Customs Union goods can be shipped across national borders without tariffs being imposed. This makes internal trade cheaper and less bureaucratic because it removes costly and time-consuming processes. These checks can be complex, for example where they require manufacturers to say where they sourced the components in their products, in order to make sure the whole product complies with all the different external trade policies (the so-called 'Rules of Origin'). An engine made in the UK may contain parts from all over the world. Without the Customs Union, some of those parts would be liable for tariffs and have to prove their origin. The engine therefore would need to be inspected and checked, and tariffs paid as it crossed the border into another EU Member State. The Single Market means none of that expense and bureaucracy is necessary.”¹²

EFTA Trade Agreements

As a result of not being subject to the EU's Common External Tariff, the EFTA States are able to negotiate their own trade deals, either collectively or individually. Since 1990, EFTA has established an extensive network of contractual free trade relations across the world.

Whilst there is no requirement to negotiate trade agreements as a group, the EFTA States have often chosen to do so. Though they often negotiate as a bloc, each EFTA State is responsible for concluding and ratifying agreements, as opposed to EFTA collectively doing this. The EFTA States currently have 27 free trade agreements (covering 38 countries). Agreements exist with, amongst others, Canada, the Republic of Korea and Singapore.¹³

At present, EFTA does not have free trade agreements with the United States of America, India (negotiations are on-going) or China (though it does have an agreement with Hong Kong, China).

EFTA trade agreements with third countries focus on traditional market access requirements. Details of the usual contents of EFTA trade agreements are available on EFTA's website¹³.

EEA-EFTA Participation in EU Funding Programmes and EU Agencies

EEA-EFTA countries are able to participate in EU funding programmes and EU Agencies. A full list of Norwegian participation in EU funding programmes and agencies is shown below ¹⁴.

EU Funding Programmes, 2014–2020:

- Horizon 2020
- Erasmus +
- Galileo
- Creative Europe
- Connecting Europe Facility (ICT part)
- European Statistical Programme
- Health for Growth
- Union Civil Protection Mechanism
- Interoperability Solutions for Public Administrations (ISA) Programme
- Employment and Social Innovation
- Consumer Programme
- Copernicus programme
- Norway also has a bilateral arrangement for participation in interregional programmes under the EU's Regional Policy.

EU agencies:

- Education, Audiovisual and Culture Executive Agency (EACEA)***
- European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)**
- European Agency for Safety and Health at Work (EU-OSHA)
- European Aviation Safety Agency (EASA)
- European Centre for Disease Prevention and Control (ECDC)
- European Centre for the Development of Vocational Training (CEDEFOP)
- European Chemicals Agency (ECHA)

- European Defence Agency (EDA)*
- European Environment Agency (EEA)
- European Food Safety Authority (EFSA)
- European Foundation for the Improvement of Living and Working Conditions (EUROFUND)
- European GNSS (Global Navigation Satellite System) Supervisory Authority
- European Institute of Innovation and Technology (EIT)
- European Maritime Safety Agency (EMSA)
- European Medicines Agency (EMA)
- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)*
- European Network and Information Security Agency (ENISA)
- Europol (the EU's law enforcement agency)*
- European Railway Agency (ERA)
- European Research Council Executive Agency (ERC)***
- European Union Satellite Centre (EUSC)*
- European Union's Judicial Cooperation Unit (EUROJUST)*
- Executive Agency for Competitiveness and Innovation (EACI)***
- Executive Agency for Health and Consumers (EAHC)***
- Research Executive Agency (REA)***
- European Police College (CEPOL)ⁱⁱⁱ

EEA-EFTA Contributions to the EU

EEA-EFTA countries participation in EU programmes is funded by EEA-EFTA financial contributions by an amount corresponding to the relative size of their GDP compared to the GDP of the whole EEA (proportionality factor). The EEA-EFTA States' participation is hence on equal footing with EU member States.

According to the Norwegian Government, between 2014 and 2020:

ⁱⁱⁱ * Bilateral agreement between the EU and Norway ** Norway participates through its Schengen membership*** Norway participates through related programmes

“ Norway participates in a number of EU programmes through provisions in the EEA Agreement or on the basis of bilateral agreements with the EU. The largest are the Horizon 2020 and, Erasmus+, Galileo and Copernicus. Norway (and our EEA partners Iceland and Liechtenstein) contributes to the budget of the programmes we participate in. For the period 2014 – 2020, Norway’s average annual commitment is 447 million euro” ¹⁵ ”

The EEA Agreement also includes a goal to reduce social and economic disparities in the European Economic Area. As a result, Norway, Iceland and Lichtenstein contribute to cohesion efforts.

The EEA Grants are related to the EEA Agreement and provide social and economic development funding by the EEA-EFTA States. This financial support aims to reduce economic and social disparities in the EEA and to strengthen bilateral relations with the beneficiary States: Bulgaria, Cyprus, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. In addition to the EEA Grants, Norway has funded a parallel scheme since 2004 – the Norway Grants.

For the funding period 2014-2021, Iceland, Liechtenstein and Norway will contribute a total of €2.8 billion to reduce economic and social disparities in Europe and to strengthen bilateral relations with 15 EU member states ¹⁶ . Of this total, Norway's annual contribution will be €391 million.

EFTA's Institutional Machinery

As with the European Union, EFTA also incorporates a number of institutions which manage both the functioning of the Association and the EFTA States' participation in the EEA Agreement.

Standing Committee of the EFTA States

The forum through which the EEA-EFTA States reach a common position ahead of deliberations with the EU is the Standing Committee of the EFTA States. The Standing Committee consists of the Ambassadors to the EU of Iceland, Liechtenstein and Norway, and observers from Switzerland and the EFTA Surveillance Authority¹⁷.

Beneath the Standing Committee there are five subcommittees each of which work with a number of working groups. The five subcommittees cover the four freedoms along with flanking and horizontal policies and legal and institutional matters:

- Subcommittee I - Free Movement of Goods
- Subcommittee II - Free Movement of Capital and Services
- Subcommittee III - Free Movement of Persons
- Subcommittee IV - Flanking and Horizontal Policies
- Subcommittee V - Legal and Institutional Matters

The Joint EEA Institutions

As with the EU, the EEA has a number of institutions to manage its operation. According to EFTA, its members do not transfer any sovereignty to the EU and, as a result, a set of institutions has been created which mirror the EU's institutions.

“ The EEA-EFTA States have not transferred any legislative competencies to the EEA institutions and they are unable, constitutionally, to accept direct decisions by the Commission or the European Court of Justice. To cater for this situation, the EEA Agreement established EEA-EFTA bodies to match those on the EU side. The EEA-EFTA States take all decisions by consensus, as opposed to the EU side where decisions related to EEA legislation are normally taken by majority vote¹⁸. ”

The joint EEA machinery consists of the EEA Council and the EEA Joint Committee at Governmental level and the EEA Joint Parliamentary Committee and the EEA Consultative Committee at legislative level.

The EEA Council

The EEA Council generally meets twice a year. Its role is to provide the political leadership for the EEA. The EEA-EFTA States are represented in the EEA Council by their respective foreign ministers whilst the EU is represented by the rotating Council Presidency¹⁹.

The Presidency of the EEA Council alternates between the EU and the EEA-EFTA side.

The EEA Joint Committee

The EEA Joint Committee is responsible for the management of the EEA Agreement and typically meets six to eight times a year. It is a forum in which views are exchanged and decisions are taken by consensus to incorporate EU legislation into the EEA Agreement ²⁰.

The Joint Committee consists of the EEA-EFTA ambassadors to the EU alongside the European Commission's External Action Service.

Four subcommittees assist the Joint Committee (on the free movement of goods; the free movement of capital and services including company law; the free movement of persons; and horizontal and flanking policies). Numerous expert and working groups report to these subcommittees.

The EEA Joint Parliamentary Committee

The EEA Joint Parliamentary Committee is an advisory body that comprises members of the national parliaments of the EEA-EFTA States and Members of the European Parliament (MEPs). It is not directly involved in the EEA decision-making process but, through reports and resolutions, it aims to monitor and scrutinise EEA-relevant EU policies and decisions adopted in the EEA Joint Committee ²¹.

The EEA Consultative Committee

The EEA Consultative Committee is an advisory body made up of members of the EFTA Consultative Committee and the European Economic and Social Committee. The Committee works to strengthen contacts between the social partners on both sides and to cooperate in an organised and regular manner to enhance awareness of and provide input on the economic and social aspects of the EEA ²².

The EEA Consultative Committee meets once a year and adopts resolutions on areas of priority.

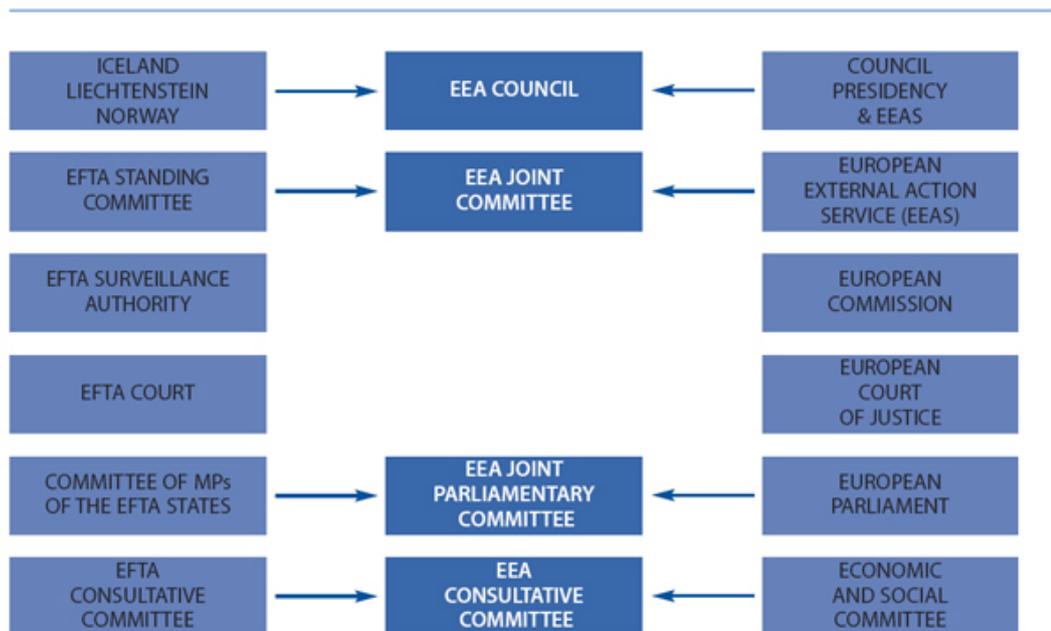
Judicial Enforcement of the EEA Agreement

Much of the discussion around the UK's departure from the European Union has centred on the objective of removing the UK from the jurisdiction of the European Court of Justice (ECJ).

Membership of the EEA would continue to require a judicial enforcement system for the agreement, but this would not directly involve the ECJ. The EEA Agreement incorporates a two pillar system of supervision where EU Member States are supervised by the European Commission; while the participating EFTA States are supervised by the EFTA Surveillance Authority.

For EFTA countries in the EEA, judicial supervision is undertaken by the EFTA Surveillance Authority and the EFTA Court.

The Two-Pillar EEA Structure



This diagram illustrates the management of the EEA Agreement. The left pillar shows the EFTA States and their institutions, while the right pillar shows the EU side. The joint EEA bodies are in the middle.

EFTA, n.d.²³

The EFTA Surveillance Authority

The EFTA Surveillance Authority (ESA) monitors compliance with the EEA Agreement in Iceland, Liechtenstein and Norway.²⁴

The ESA is independent of the EEA-EFTA States and its role is to safeguard the rights of individuals and undertakings under the EEA Agreement. It does this by ensuring free movement, fair competition and control of state aid. The ESA's role mirrors the role of the European Commission within the EU.

The EFTA Court

The EFTA Court fulfils the judicial function within the EFTA system, interpreting the EEA Agreement with regard to the EFTA States participation in the Agreement ²⁵ .

The EFTA Court's web page sets out the primary role of the Court:

“ The Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of EEA law rules, for giving advisory opinions to courts in EFTA States on the interpretation of EEA rules and for appeals concerning decisions taken by the EFTA Surveillance Authority. ²⁵ ”

The proceedings before the EFTA Court consist of a written part and an oral part and all proceedings will be in English. In direct actions, the judgement is rendered in English only. Advisory opinions are rendered in English and in the language of the requesting court.

Whilst the European Court of Justice serves as the judicial function for the European Union and is able to provide preliminary rulings which are binding on EU member States' national courts, the EFTA Court can only give advisory opinions which are not binding on the national courts of the EEA-EFTA States.

The EFTA Court's relationship with the Court of Justice of the European Union is partly defined in the EEA Agreement. Article 6 requires the EFTA Court to take account of Court of Justice case law when it relates to judgements which pre-date the signing of the EEA Agreement. Whilst the EFTA Court is not bound by case law which emanated from the Court of Justice after the signing of the EEA Agreement, provision is made in Article 105 of the EEA Agreement to ensure the EEA Joint Committee continues to monitor Court of Justice case law:

“ The EEA Joint Committee shall keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court. To this end judgements of these Courts shall be transmitted to the EEA Joint Committee which shall act so as to preserve the homogeneous interpretation of the Agreement. ²⁶ ”

In addition to the work of the EEA Joint Committee, Article 106 of the EEA Agreement provides for a system of exchange of information concerning judgements by the EFTA Court and the Court of Justice of the European to ensure "as uniform an interpretation as possible" of the EEA Agreement.

Structure of the EFTA Court

The EFTA Court consists of three Judges, one nominated by each of the EFTA States party to the EEA Agreement. The Judges are appointed by common accord of the Governments for a period of six years. The Judges elect their President for a term of three years.

How has EEA-EFTA Membership worked for Norway?

In 2012, the Norwegian Government undertook a review titled "Outside and Inside: Norway's agreements with the European Union". In relation to the EEA Agreement, the review stated:

“ Norway's relations with the EU are governed by a number of agreements. The largest and most important of these is the EEA Agreement, which at the time it was signed – in 1992 – was the most extensive and comprehensive agreement Norway had ever entered into. Since then, it has been further developed. And it has ended up affecting far more sectors of society than most people envisaged 20 years ago. In addition, Norway has entered into a number of other agreements with the EU over the years, for example on border controls, police cooperation, immigration, foreign, security and defence policy, regional policy, agriculture and fisheries. The list is a long one²⁷ . ”

The report included conclusions relating to both the economic benefit of the EEA Agreement and the democratic deficit caused by EEA membership as a non-EU member. On the economic benefit of the EEA Agreement, the report suggested that EEA membership was "one of many factors" contributing to Norway's economic growth but that it was a crucial stabiliser underpinning the Norwegian economy:

“ There are many reasons for the upswing in the Norwegian economy, not least Norway's oil and gas activities, and its association with the EU is only one of many factors and difficult to measure in isolation. However, the EEA Agreement has provided a stable and relatively predictable framework for almost all aspects of Norway's economic relations with the EU member states, which together constitute Norway's most important economic partner by far.²⁷ ”

On the impact of Norway being a taker rather than maker of laws as a result of the EEA Agreement, Outside and Inside concludes:

“ The most problematic aspect of Norway's form of association with the EU is the fact that Norway is in practice bound to adopt EU policies and rules on a broad range of issues without being a member and without voting rights. This raises democratic problems. Norway is not represented in decision-making processes that have direct consequences for Norway, and neither do we have any significant influence on them. Moreover, our form of association with the EU dampens political engagement and debate in Norway and makes it difficult to monitor the Government and hold it accountable in its European policy. This is not surprising; the democratic deficit is a well-known aspect of the EEA Agreement that has been there from the start. It is the price Norway pays for enjoying the benefits of European integration without being a member of the organisation that is driving these developments.²⁷ ”

A post-Brexit option for the UK

Following the General Election on 8 June 2017, the UK Government's plans for a Brexit involving departure from the Single Market are perhaps less clear. As EEA Membership would require continued observance of free movement rules, it is unlikely that the UK Government will pursue an EEA option as a permanent alternative to EU membership upon Brexit. However, it is possible that EEA membership could be pursued as a transitional stage whilst a Free Trade Agreement between the EU and the UK is negotiated.

In the event the UK decided to seek EEA membership as a transitional arrangement, it is likely that it would need to comply in full with the EEA Agreement, including with regard to the four freedoms.

A phased approach to EU membership for Scotland?

In the event that Scotland was to vote for independence at some point after the UK has left the European Union, it has been suggested that, as an interim measure, Scotland could look to EEA-EFTA membership as a stepping stone to EU membership. For example, the Director of the Scottish Centre on European Relations, Kirsty Hughes, has raised the possibility of an independent Scotland firstly joining EFTA and then signing up to the EEA Agreement, given that the procedures to join the EU could take some time to negotiate.²⁸

Assuming an independent Scotland was seeking EEA membership shortly after the UK had left the EU, it is likely that Scotland would still largely comply with EU law, making accession to the EEA Agreement more straightforward. EEA-EFTA membership would also mean that Scotland would not be required to signal its intention to join the Eurozone or participate in the Common Fisheries and Agriculture Policies. As EEA-EFTA members are not participants in the Customs Union, Scotland would also be able to negotiate its own trade agreements, including potentially with the rest of the UK.

Participation in the EEA Agreement would require Scotland to respect the four freedoms including freedom of movement for persons. One outcome might be that the land border between an independent Scotland and England could require some sort of immigration checks, though any solution found for the island of Ireland following Brexit might be a relevant indicator of the requirements in this area.

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