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UK-EU relations after BREXIT – Which arrangements are possible?

Av Sven Norberg

UK-EU RELATIONS AFTER BREXIT – WHICH ARRANGEMENTS ARE POSSIBLE?

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1. INTRODUCTION[1]

Following the referendum held on 23 June 2016 in the United Kingdom (UK), whereby around 52 % of the votes were in favour of the UK leaving the European Union (EU) the UK Government on 29 March 2017 in a letter from the Prime Minister, Ms. Theresa May to the President of the European Council with reference to Article 50 of the Lisbon Treaty announced its intention to withdraw from the EU. The purpose of this article is from an EU law point of view to look at and a bit closer examine what possible arrangements for a future UK-EU relationship that are possible in the light of earlier precedents. In this examination will be recalled the particular character of the EU as a Union of law, where the guarantees for legal certainty and non-discrimination are particularly strong not only for the EU Member States but also for their nationals. It is recalled that overcoming the risk of a legal imbalance arising between the EU and the EFTA States in the European Economic Area (EEA) became a major objective for the EEA negotiations 25 years ago.[2]

As a point of departure is taken Ms. May's Lancaster House speech on 17 January 2017 and the twelve principles outlined therein.[3] These were then central in the Government White Paper "The United Kingdom's exit from and new partnership with the European Union" published on 2 February 2017.[4]

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1 This article is based on a presentation given on 8 March 2017 at a seminar organized in Stockholm by the Swedish Network for Research in EU law.

2 See section 5 below.

3 https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.

4 ISBN 9781474140669; Cm 9417.

2. THE UK GOVERNMENT POSITION

Of the twelve guiding principles set out both in the Lancaster House speech by Ms. May and in the Government's White Paper, there are in particular five that must be considered decisive for what kind of arrangements with the EU that may be possible. Those principles, which also will be addressed in the following, are:

- Providing certainty and clarity (Great Repeal Bill nr 1),
- Taking control of our own laws (No role for CJEU nr 2),
- Controlling immigration of EU nationals to UK (nr 5),
- Ensuring free trade with European markets (nr 8),
- Delivering a smooth, orderly exit from the EU (nr 12).

Since the formal negotiations between the EU-27 and the UK Government started on 19 June 2017 nothing has happened, that would give reason to believe that any fundamental changes in the UK position are considered. Media reports have, however, indicated that there may be rather differing views within the Cabinet as to what has been labelled a "soft" or a "hard" Brexit. This has constantly been denied by representatives of the Prime Minister. It would furthermore seem that most of such discussions do not refer so much to the final agreement to be negotiated between the EU and the UK but rather to transitional arrangements for a period immediately after 29 March 2019, when Brexit is supposed to become a reality in accordance with Article 50 TEU.

3. SOME PRECEDENTS AS TO TRADE ARRANGEMENTS

Before looking closer at what the above mentioned principles may imply for what arrangements between UK and the EU after a Brexit may be possible, it would seem useful to look at which already existing international arrangements in the field of trade that may serve as precedents. Such arrangements have also both before and after the Brexit referendum been referred to as relevant without further analysis of how far-reaching they may be. In the following some will be shortly commented upon, while especially a few that are more relevant with regard to the UK case will be more deeply commented upon in the three following sections.

3.1 EFTA and FINEFTA

EFTA was created in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom as a reaction upon the foundation of the European Economic Community (EEC) by Belgium, France, Germany, Italy, Luxembourg and the Netherlands through the 1957 Treaty of Rome. The purpose of EFTA was, however, limited to creating a free trade area for trade in industrial goods, which objective was achieved in 1966. In 1961 FINEFTA was created as an Association between the EFTA States and Finland, whereby in principle free trade was created with Finland to the same extent as within EFTA.[5]

The essential provisions of the EFTA Convention during more than 40 years mainly dealt with free trade in industrial goods, i.e. provisions prohibiting tariffs and quotas. With the Vaduz Convention concluded in 2001 between the four remaining EFTA States the scope was widened both substantially and politically.

3.2 The EFTA-EC Free Trade Agreements (FTAs)

When Denmark and the UK were to leave EFTA to join the EC in 1973, it became vital both for the two leaving EFTA States and the remaining seven not to give up the considerable trade liberalization that had been achieved since 1960. "Free trade once achieved must never be given up" was the firm principle that now forced the EC to accept to conclude the first Free Trade Agreements in industrial goods in its history. Thus were in 1972 and 1973 concluded 14 FTAs, one between each of the seven EFTA States and the EEC and one with the European Coal and Steal Community (CECA). The FTAs were identical but separate. Full free trade under these FTAs was achieved between EC and EFTA after ten years in 1983. In 1994 the FTAs were replaced by the European Economic Area (EEA) Agreement for all EFTA States but Switzerland. The Swiss FTA is still in force and provides the basic rules regarding free trade in industrial goods between the EU and Switzerland.

A Joint Committee, where both parties to the FTA are represented, takes decisions by unanimity. No other provisions exist for the settlement of disputes that may arise between the parties.

[5] Iceland joined EFTA in 1970, Denmark and the UK left to join the EC in 1973, Portugal joined the EC and Finland became full Member of EFTA in 1986, Liechtenstein joined EFTA in 1991 and Austria, Finland and Sweden left to join the EU in 1995.

Through two judgments handed down in the form of preliminary rulings in the cases *Kupferberg*[6] and *Polydor*[7] the European Court of Justice (ECJ) gave these agreements an entirely new dimension, that hardly could have been foreseen, when they had been negotiated ten years earlier. In these judgments the ECJ established that once in force the agreements did not only become an integral part of Community law. They had also become directly applicable and provisions therein, to the extent that their wording was sufficiently clear and precise, could have direct effect.[8]

By this development it became clear that provisions of central importance to the free trade like those on abolition of tariffs and quotas on industrial goods could be invoked by EFTA citizens and economic operators against non-complying EC Member States before national courts and finally before the ECJ, who were obliged to recognize the rights of the claimants that under EC law were derived from these agreements. This would also, as shown in the following, have a decisive importance for the development of the later new relationship with the EU through the EEA.

3.3 EU-Turkey

Already in 1963 the EC concluded with Turkey the Ankara Association Agreement. The objective was to establish close relations with Turkey with a view in a future to be able to develop that further. In 1995 a Customs union with Turkey was established. The scope is all trade in goods including processed agricultural products, as well as the alignment by Turkey with certain EU policies, such as technical regulation of products, competition and intellectual property rights.

The Association Council adopts decisions by unanimity. Under Art. 25 (2) the Council may settle a dispute or decide to submit it to the CJEU or any other existing court or tribunal. If the dispute is not settled under that provision, the Council shall determine detailed rules for arbitration or any other judicial procedure. This procedure has never been invoked by either party because rather like in the old GATT dispute settlement either party could block its functioning.

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6 Case 104/81, *Hauptzollamt Mainz v. Kupferberg* [1982] ECR 3641.

7 Case 270/80, *Polydor Ltd. and others v. Harlequin Record Shops Ltd. and others*, [1982] ECR 329.

8 Cf. also cases 181/73, *Haegeman v. Belgian State*, [1974] ECR 499, and 87/75, *Bresciani v. Amministriazione Italiana delle Finanze*, [1976] ECR 129.

3.4 CETA (Comprehensive Economic and Trade Agreement EU-Canada)

This Agreement between the EU and Canada was signed on 30 October 2016 but has not yet entered into force. Once applied it will remove customs duties (98,6 % of trade in goods are to be tariff-free), end restrictions on access to public procurement, open up the services market (but not banking) and offer better conditions for investors etc.

Institutionally, there is a Joint Committee, under which there are a number of special committees in charge of managing various aspects of the agreement. If disputes would arise, the Contracting parties may use the system under WTO or bring the dispute before special arbitration panels set up under the CETA.

3.5 DCFTA (Deep and Comprehensive Trade Agreement)

Under this heading come a number of a new generation of association agreements concluded between the EU and Ukraine, Georgia and Moldavia. They cover most of the major EU policies and competences.

Trade in goods, services and capital are covered but not persons. Core FTA aspects include customs matters (zero tariffs, customs procedures, technical standards and regulations for goods), trade remedies, competition policy, IPR, public procurement etc.

The Agreements contain also provisions for participation in major EU programs and a number of technical EU agencies.

Institutionally, the Agreements lay down provisions on an Association Council composed of representatives of both sides. Dispute settlement is based on that of the WTO but involves a faster procedure.

4. THE EUROPEAN ECONOMIC AREA (EEA)

4.1 Substance – The four freedoms of the Internal Market

When signing the EEA Agreement in Oporto on 2 May 1992, the original contracting parties, the EU and its then twelve Member States, on the one hand, and the then seven EFTA States, on the other,[9] set out to create a "substantially improved Free Trade Area",[10] where all the relevant *aquis communautaire* regarding the four freedoms of the Internal Market would apply. This means that today some 25 years later the EEA Agreement has incorporated more than

[9] EFTA as such is not a party to the EEA.

[10] Article 1.1 EEA reads: "*The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions for competition, and the respect of the same rules, with a view of creating homogeneous European Economic Area, hereinafter referred to as the EEA*."

9.000 EU legal acts (at signature 1.845). The original dominance of Directives is replaced by that of Regulations (75 %). In addition, a great number of "*horizontal and flanking policies*", e.g. company law, R&D, education, consumer protection, environment, SME:s and the social dimension were also included.

However, the EEA does not contain any common trade policy, no common agricultural or fisheries policies, no transport or taxation policies. As to trade in agricultural goods and fisheries a number of bilateral agreements have been concluded.

4.2 Institutions – the Two-pillar Structure

Special and characteristic for the EEA is its institutional *"Two-pillar structure",* where there are two institutional structures, one for the EU and its Member States, and one for the EFTA States. This means that for the EU and its Member States it is the EU Commission and the Court of Justice of the EU (CJEU), which are in charge for monitoring the application of the Agreement and interpreting its provisions. For the EFTA States the EEA required the establishment of two new supranational institutions, the EFTA Surveillance Authority (ESA) and the EFTA Court with corresponding mandates as those of the EU Commission (as to surveillance) and the CJEU. This was done through a special agreement between the EFTA States, the Surveillance and Court Agreement.[11]

As to the Joint decision-making under the EEA Agreement, the EEA Joint Committee is in charge of the daily operation, as well as of taking over new EU acquis into the Agreement. There is also an EEA Council, which meets at Ministerial level, as well as an EEA Joint Parliamentary Committee and an EEA Joint Consultative Committee. Article 102 EEA regulates the procedure for taking on new acquis, where not only the EU side but also the EFTA side has to act with one voice.

Dispute settlement between Contracting Parties is to be handled by the EEA Joint Committee (Article 111 EEA) and ultimately, if no agreement can be reached, there remains only safeguard measures.

4.3 A Dynamic and Homogeneous EEA

The Homogeneity objective

The two adjectives "*dynamic and homogeneous*" are more than anything else characteristic for the EEA. The EEA is applicable in relations between the EU and its Member States, on the one, and the participating EFTA States, on the

[11] The Agreement of 2 May 1992 between the EFTA States on the establishment of a surveillance authority and a court of justice.

other side, as well as in relations between the latter. The real challenge for this extremely ambitious project was thus to create a treaty that can be operated in such a way that the objective of maintaining the EEA *homogeneous* in relation to corresponding provisions of the EU Internal Market, which is under constant development, can be achieved.

The successful operation of the EEA since its entry into force on 1 January 1994 has proven that this objective, which at the time was met by considerable skepticism, not only could but also has been achieved. Without going into all the details of how this was done in the Agreement,[12] a summary of the various means applied are given in the following.

To start with, after serious discussions it was agreed for the provisions of the EEA Agreement to *copy the main articles of the EEC Treaty* and thus to refrain from any attempts to try to codify the almost 35 years of case law developed by the ECJ in its interpretation thereof. If this would not have been done, one would certainly have arrived at two different sets of rules, which never could have been applied in a homogeneous way in relation to each other. For the incorporation of the numerous legal acts of EC secondary law, such as directives and regulations, a special drafting technique was used by which the EC Acts were taken over through both a special reference technique and by elaborating horizontal adaptations of all these acts.[13] This was done in order to reduce both the volume of texts and as far as possible the number of technical modifications thereto.

The Preamble to the EEA Agreement contains important expressions of the political ambitions and objectives of the Contracting Parties. After the introductory recitals enumerating the Contracting Parties there are thus sixteen recitals where these express certain main principles and objectives on the creation of the EEA. After the first Opinion 1/91[14] of the ECJ on 14 December 1991, whereby

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[12] For a more extensive description of this reference is made to Chapter IX, Methods of Ensuring a Homogeneous EEA in *Norberg et al: EEA Law, A Commentary to the EEA Agreement, Kluwer 1993*.

[13] These are laid down in Protocol 1 to the EEA Agreement on Horizontal Adaptations.

[14] In Opinion 1/91 ECR [1991] 6079, the ECJ declared the system for judicial supervision proposed in the agreement incompatible with the EEC Treaty. However, the ECJ in its description of the Agreement quoted what it erroneously called *"the sole recital in the preamble to the agreement"* (bottom of p. 6085). The recital quoted was actually the fourth of fifteen recitals. This and other factual errors in the Court's description of the EEA demonstrate, that the Court in fact had never looked at the complete text in English, that it after request had received from the Commission on 30 October 1991 and on the basis of which as stated in "I – Description of the request for an opinion" the Court's opinion was given. The Commission had accepted English as the negotiating language for the EEA Agreement and the English version of the text was the only one that at this stage was the subject of negotiations between the parties. However, it is obvious that the Opinion instead was based upon an incomplete and non-official translation into the French language that was accompanying the Commission's request of 14 August 1991. Most surprisingly, it would now seem that the ECJ does not want its erroneous findings to be known. On the Court's website there are today

the Court declared "the judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community", the parties renegotiated within two months the institutional provisions of the Agreement and in place of a joint EEA Court, integrated with the ECJ and composed of five ECJ judges and three out of seven EFTA judges, a new EFTA Court should be created. In addition in several places the homogeneity objective was further emphasized.[15]

It is worthwhile here especially to mention the new fifteenth recital in the *Preamble* and *Chapter 3 Homogeneity, surveillance procedure and settlement of disputes*. The fifteenth recital reads:

> "Whereas, in full deference to the independence of the courts, the objective of the Contracting Parties is to arrive at, and maintain, a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement and to arrive at an equal treatment of individuals and economic operators as regards the four freedoms and the conditions for competition."

This recital is an expression of the fact that, formally speaking, there are two separate but parallel legal orders, EU law and EEA law, which in practice together will form a common European legal system. In addition, the parties added to the EEA Agreement in *Part VII Institutional Provisions in Chapter 3* a new *Section 1 Homogeneity,* consisting of Articles 105–107 EEA, before the Sections on the surveillance procedure and on the settlement of disputes. The principle of homogeneity is not only a principle of law but to the fullest possible extent a "*political principle*", expressing the Parties' overarching political objectives.

Relevance of the CJEU case law

Following the decision as far as possible to take over word by word the provisions of the Treaty of Rome into the EEA Agreement it was obvious that there had to be provisions regarding the taking over the ECJ case law up to the signature of the EEA. This was taken care of by Article 6 EEA, which reads:

> "Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these

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only the final parts of Opinion 1/91 (pp 6099 to 6112). The introductory parts as well as sections: I – Description of the request for an opinion, II – Procedure, III – Appraisal of the agreement and IV – Summary of written observations submitted by the Institutions and the Governments (pp 6079 to 6098) are neither there, nor are they to be found on Euro Lex. Today the full text of Opinion 1/91 is only available in the printed editions of the ECR.

[15] In Opinion 1/92 [1992] ECR I-2821 on 10 April 1992 the ECJ gave its green light to the revised Agreement.

> two Treaties, shall in their implementation and application be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the signature of this Agreement.[16]

As the homogeneous application of the common rules is the without comparison most important obligation of the Agreement, the importance of Article 6 EEA cannot be strongly enough underlined. This question was one of the most difficult and delicate to handle during the negotiations.

The solution laid down in Article 6 EEA is inspired by corresponding solutions in the 1988 Lugano Convention.[17] The problems in connection with that Convention, which was parallel to and essentially reproduced the text of the corresponding 1968 Brussels Convention, were solved and laid down in Protocol 2 to the Lugano Convention.

As to the further developments of case law after the signature of the Agreement, there were for the EFTA Contracting Parties both constitutional and political obstacles to accepting a treaty obligation regarding the acceptance of future judgments rendered by a "foreign" court. In view of the fundamental interest, especially in the absence of a joint mechanism, to keep future interpretations of mirroring EC and EEA rules as uniform as possible, while at the same time preserving the autonomy of the EFTA States and their judicial systems, Article 6 had to be supplemented by other means. Apart from the already mentioned fifteenth recital in the Preamble and Section 1 of Chapter 3 of Part VII, reference should also be made to Article 3 of the ESA/EFTA Court Agreement concluded between the EFTA States. This provision is in its first paragraph identical to Article 6 EEA, but contains in its second paragraph an obligation for the ESA and the EFTA Court also to *take due account* of future case law of the ECJ. This wording is also inspired by language regarding the Lugano Convention.

Legal effects of EU acts taken over in the Agreement

Article 7 EEA reads:

> "Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:
> a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;
>
> b) an act corresponding to an EEC directive shall leave the authorities of the Contracting Parties the choice of form and method of implementation."

[16] The EEA Agreement was signed in Oporto on 2 May 1992.

[17] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Lugano on 16 September 1988.

Such a provision was necessary not only in order to secure the correct implementation of these rules in the Contracting Parties but also in order to avoid, inter alia, that, due to the public international law character of the Agreement, especially in monist Contracting Parties, acts corresponding to EEC directives would become more binding under EEA law than the EEC directives under EC law in EC Member States.

Article 7 EEA is modelled on Article 189 EEC and reiterates the legally binding nature of the secondary EC legislation as integrated into the Agreement through the references listed in the Annexes or, with regard to the future, through decisions of the EEA Joint Committee. Article 7 furthermore lays down the obligations for the Contracting Parties to see to it that the Community acts are in an appropriate manner made part of the legal system of the Contracting Parties, and that this shall be done in a way which as closely as possible corresponds to the EU one.

The aim of Article 7 is to ensure the legal homogeneity within the EEA, i.e. that the acts referred to in the Annexes in practice produce the same legal results in the entire European Economic Area, in the EFTA States as well as in the Community.

Article 7 is supplemented by Protocol 35 on the implementation of EEA rules. The sole article of this Protocol reads:

> "For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases".[18]

From this Protocol follows that if existing principles are not sufficient to ensure that the implemented EEA rules prevail, the EFTA States are obliged to take further measures.

5. NEGOTIATING EEA – MAIN CHALLENGES

Substance

The objective of the EEA was soon established as being to achieve the fullest possible realization of the free movement of goods, services, capital and persons with the relevant *acquis communautaire* as a common legal basis for the EEA. This meant an end to the "cherry-picking" of subjects for cooperation. When the preparations for the formal negotiations were initiated in the spring of 1989, the EFTA States were met by the surprise that they would now be

[18] In relation to Protocol 35 there is a Joint declaration, contained in the Final Act to the EEA Agreement, where the Contracting Parties have expressed their understanding that Protocol 35 does not restrict the effects of those existing internal rules which provide for direct effect and primacy of international agreements.

obliged to take over the full *acquis communautaire* in all areas of the Internal Market of relevance for the EEA. This would *also in the future* apply to new EC acts or amendments to the acquis. Exceptions would not be possible and transitional periods could only be imagined, if there were very serious difficulties. All this meant for the negotiations that the traditional bottom-up approach mostly used in international negotiations now was replaced by a *top-down* approach, whereby decisions regarding substance were taken at the political level and with the implementation thereof being left to the expert level.

Institutional

– Legal imbalance between the EC and EFTA not acceptable

While the EC had special supranational institutions for monitoring the application of Treaty rules (the Commission) and for their interpretation (the ECJ), the EFTA side had nothing similar. In addition, most EFTA States followed a dualistic legal tradition as to the role of international treaties in national law. The ECJ judgments in the *Kupferberg* and *Polydor* cases[19] had, however, shown that the FTAs between the EC and the EFTA States as forming part of Community law were directly applicable and that sufficiently precise and clear provisions therein could produce direct effect in the EC, if invoked by EFTA individuals and economic operators. In the beginning of 1998 the EC Commission had thus warned its Member States for the considerable risks of such a *legal imbalance* in a future more elaborated relationship with the EFTA side. Since national courts or institutions never could replace such supranational institutions as the Commission and the ECJ, the EFTA side would also have to create such institutions for its pillar in the EEA. This was made clear very early during the formal negotiations. The establishment of the EFTA Surveillance Authority was also agreed at an early stage, while the creation of the EFTA Court became a reality only after the ECJ's rejection of the setting up of a joint EEA Court.[20]

– Securing the maintenance of the dynamic and homogeneous EEA

In order to guarantee that the EEA would develop in parallel to the Internal Market, it would also be necessary without delay to incorporate new EC acts or amendments to such acts. Towards the end of 1987 the Commission had been very close to make a fatal mistake, when preparing the conclusion after 17 years of the negotiations with Switzerland on an agreement opening up the market for non-life insurance. Someone in the Commission Legal Service discovered,

[19] Cf. notes 6 and 7 above.
[20] Cf. Opinion 1/91 and note 14 above.

however, that the EC through the draft agreement risked to make further developments of its legislation in this field conditional upon an approval by Switzerland. Thus was invented the so-called "clause d'autodéstruction", also later referred to as "clause de guillotine", which would result in the whole agreement being terminated, if Switzerland would not accept an amendment that the EC had adopted for its part.[21]

It was also stated in the mandate for the EC negotiators by the European Parliament and the EC Council, that the EEA Agreement should contain a corresponding "clause de guillotine". However, the more progress was made during the negotiations, the more it was realized on the EC side, that it would not be in anyone's interest to let this the most extensive and voluminous agreement ever negotiated with a third State simply to be destroyed in its entirety for a failure to agree on what might be only a minor piece of legislation. Thus Article 102 EEA (in Chapter 2 The decision-making procedure of Part VII Institutional Provisions) was created. It is a very long provision of six subparagraphs, laying down a very drawn out and detailed procedure in case there would be such a failure in the EEA Joint Committee to reach an agreement. This procedure finally ends, unless the Joint Committee would not decide otherwise, with a decision on the provisional suspension of the part of an Annex to the Agreement that is affected by the new amendment.[22] It has so far never happened that such a provisional suspension has been decided upon.

As explained above under 4.3, the further developments of case law regarding the Internal Market after the signature of the EEA Agreement is dealt with in Article 6 EEA, as well as in Article 3 of the ESA/EFTA Court Agreement. It is worthwhile to underline that, as shown in practice by the case law of the CJEU, this is not a one way street. It works on the contrary both ways by the CJEU and the General Court frequently referring to the judgments of the EFTA Court. Thus so far there have been such references made in 233 cases by Advocate-Generals, the CJEU and the General Court.[23] In this context should also be mentioned the Declaration to the Final Act by the EC on the rights for the EFTA States before the ECJ, whereby the EC undertook to amend the Statute of the Court to open intervention possibilities as well as possibilities to submit opinions when references for preliminary rulings are made. Such possibilities are also granted before the EFTA Court to the Commission, other EU institutions and EU Member States.

To sum up, the overall main challenge arises from the fact that the EEA Agreement has created a new legal order, EEA law, that is parallel to and mir-

[21] Cf. Art. 39.8 of the Agreement of 10 October 1989 between the European Economic Community and the Swiss Confederation concerning direct insurance other than life insurance.

[22] Article 102.5.

[23] Carl Baudenbacher, President of the EFTA Court, in presentation at First Judicial Summit of the EFTA Pillar, Luxembourg, 2 May 2017.

rors EU law and which in areas covered by both legal orders delivers the same result as EU law, to the benefit of individuals and economic operators within the whole of the EEA.

6. WHAT ABOUT THE EU – SWISS ARRANGEMENTS?

Substance

Switzerland was also one of the original signatories to the EEA Agreement,[24] but after a referendum on 6 December 1992, where a tiny majority of the population but a clear majority of the cantons had voted no to a Swiss ratification of the EEA, it was decided to proceed with the traditional Swiss model by seeking to negotiate with the EU a series of bilateral sectoral agreements.

Free trade in industrial goods had already existed under the 1972 FTA.[25] In addition there existed a great number of bilateral agreements regarding in particular various food products, like cheese and viande seché. The 1989 non-life insurance agreement has already been mentioned.[26] Since 1990 Switzerland has also had an Agreement on the facilitation of Customs procedures and security for goods transports.

An important ambition of the Swiss EU policy has been to participate in selected areas of the Single Market. This has resulted in the conclusion between the EU and Switzerland of two sets of bilateral agreements, *Bilaterals I* and *Bilaterals II*, which came into force in 2002 and 2005, respectively.

The *Bilaterals I*, signed in 1999, is composed of seven sectoral agreements on Free movement of persons, Technical Barriers to Trade (TBTs) based on Mutual recognition, Public procurement, Agriculture, Civil aviation, Road transport and Research. All agreements are legally interrelated, meaning that the "seven agreements are intimately linked to one another by the requirement that they are to come into force at the same time and that they are to cease to apply at the same time, six months after the receipt of a non-renewal or denunciation notice concerning anyone of them."[27]

The package of *Bilaterals II* is composed of nine sectoral agreements signed in 2004, which came into force in 2005. Negotiations on an agreement regarding services was suspended at an early stage. The nine agreements concern: the Schengen/Dublin Conventions, Taxation on savings, Fight against fraud, Pro-

[24] The Swiss Federal Council had also on 16 May 1992 submitted an application for Membership in the EC. After the vote on the EEA the application was suspended but finally withdrawn on 27 July 2016.

[25] Cf. under 3.2 above.

[26] Cf. note 21 above.

[27] Cf. EU Council and Commission Decision of 4.4.2002, EU OJ L 114/1 of 30.4.2002.

cessed agricultural products, MEDIA, Environment, Statistics, Pensions and Education, vocational training and youth.

The great majority of the bilateral agreements fall in general into one of three kinds:

a) those that provide for *mutual recognition* of equivalence of legislation;
b) those where *acquis communautaire* in a special field is adopted; and
c) those which provide for cooperation with EU programs and agencies.

In conclusion it may be said, that all together the scope of the numerous Swiss arrangements with the EU is considerably less comprehensive than that of the EEA. It nevertheless allows Switzerland a certain participation in the Single Market, especially in the field of trade in industrial goods and the free movement of persons. The failure to reach a more general agreement regarding services, which would seem mainly to be caused by a Swiss unwillingness to develop the institutional structure of the relationship, has evidently been a major disappointment, not the least for the Swiss financial sector.

Institutional aspects

All these agreements are expressions for a classical form of intergovernmental cooperation. There has been no transfer of legal or decision making power to a supranational body. The only exception concerns competition in the field of civil aviation, where the sole competent institutions are the EU Commission and the CJEU.

Each bilateral agreement is administered by a separate Joint Committee. Amendments to these agreements are made by Joint agreement of the Contracting Parties with ratification requirements etc. The Joint Committees are only competent for making technical up-dates, e.g. listing laws, authorities or products.

While the fulfillment of the treaty obligations on the EU side is monitored by the EU Commission and ultimately by the CJEU, nothing corresponding exists on the Swiss side.[28] In the absence of any separate dispute settlement mechanism the responsibility falls upon each Joint Committee, which can only act by consensus between the two sides, to try to seek a solution.

That the EU originally accepted this piece-meal approach may be explained by expectations at the time that this would form a step in Switzerland's deeper integration with the EU. However, it soon became more and more obvious that Switzerland was not contemplating an accession to the EEA, let alone an EU Membership. At the same time it became clear that the administration of

[28] Cf. The Legal imbalance referred to in section 5 above.

numerous bilateral agreements, each with a separate joint committee, in combination with extended ratification procedures of even minor updating of these agreements was very cumbersome to manage for the EU side.

Since 2008 the EU Council has thus repeatedly expressed its dissatisfaction with the present state of affairs and recalled "*that a precondition for further developing the sectoral approach remains the establishment of a common institutional framework for existing and future agreements through which Switzerland participates in the EU's Single Market, in order to ensure homogeneity and legal certainty for citizens and businesses. The Council stresses the common understanding between the EU and Switzerland about the need to finalize the negotiations on the institutional framework agreement as soon as possible. Its conclusion will allow the EU-Swiss comprehensive partnership to develop to its full potential.*"[29]

In practice these EU conditions would mean, that Switzerland must accept not only an institutional framework, that covers all agreements with the EU and that provides a mechanism for a smoother updating of them in pace with the developments of the EU. In addition, there would have to be additional institutional arrangements for monitoring the correct application by Switzerland as well as for judicial interpretation and settlement of disputes.

Suggestions that Switzerland could avail itself of the existing EFTA institutions ESA and the EFTA Court reinforced by a Swiss College Member and a Swiss Judge have so far been rejected. In the absence of tangible progress on these issues the EU has put further negotiations on new sectoral agreements on hold, which also means that a since several years almost finished energy agreement never has been concluded.

7. WHERE DO THE PRINCIPLES OF MS. MAY LEAD IN THE LIGHT OF THIS?

Before examining the most critical of Ms. May principles, it would seem appropriate here to recall, that from the EU side two overruling principles would seem to be decisive for the future EU – UK relationship, *the correct balance between rights and obligations* and *the proportionality*. Apart from this implying that "no cherry-picking" will be allowed, it also means that a third country cannot enjoy similar rights as a Member State.

With reference to what was said in the beginning regarding the five of the twelve of Ms. May's principles, which must be seen as conclusive for what arrangements that may be possible after Brexit, each of the five will here be briefly commented upon

[29] EU Council conclusions on EU relations with Switzerland, 28.8.2017. EU Council Press release 93/17.

7.1 The Repeal Bill

On 21 June 2017 *the Repeal Bill*[30] was announced in the Queen's speech to the new Parliament and it was published on 13 July 2017 under its official title of the *European Union (Withdrawal) Bill*. The main idea of this bill is to repeal the 1972 EC Act, which provides legal authority for EU law to have effect as national law in the UK, and to transform all acts of EU law – as they stand at the moment before leaving – into UK law. This will then be subject to the exclusive interpretation by UK courts. As said in the White Paper the supremacy of EU law over UK law will be ended.

EU case law before withdrawal also becomes part of UK law – but the bill allows the Supreme Court (and in some cases the High Court) to overturn earlier judgments – but expects that to be done "sparingly". The bill also gives the courts guidance on how to make decisions in future cases on "EU derived law".

In its bill the Government has further said that the courts are not bound by future rulings of the CJEU but may take them into account, if they consider it to be appropriate. This lead the President of the UK Supreme Court Lord Neuberger recently in an interview in BBC Radio 4 to request that the parliament must give judges clear statutory guidance on what they should do about ECJ judgments after Brexit – or be prepared to defend them against accusations of political interference.[31]

Although this new UK law thus "*should be interpreted as at present*" it would seem very clear that the absence of direct influence from future developments of EU case law through the CJEU quite soon may risk to open up a gradually but constantly widening gap between the interpretation of this UK law and corresponding EU law. In addition, it must be recalled that the UK for years has had a disproportionately large impact upon the development of the CJEU case law. This has not only been due to the many excellent UK members of the EU courts, but in particular to the great number of references to the CJEU from UK Courts and to the particular loyalty UK Courts have demonstrated over the years in applying EU law, a legal order that seems to have been particularly suitable to common law lawyers.

7.2 Taking control of our own laws

The pronouncement that there should be no more role for the CJEU in the UK legal order has to be seen together with the extremely low ambitions demonstrated in the White Paper's choice of examples for possible dispute settlement

[30] What earlier had been referred to as the Great Repeal Bill, a term coined by Ms. May, was renamed after the Parliamentary elections on 8 June 2017.

[31] Cf. Editorial in Financial Times 11.8.2017.

mechanisms.[32] None of these go beyond dispute settlement through arbitration mechanisms, all of which are accessible only for Contracting Parties but not for individuals or economic operators. If this remains the position of the UK, it must be concluded, that after 46 years of primacy, direct applicability and direct effect of EU law in the UK to the benefit of individuals and economic operators all this will come to an end after 29 March 2019. It is recalled that the UK has a dualistic tradition as to how international agreements are dealt with in national law.[33]

Against the background of what has been said above about the EEA and the EU-Swiss relations, it must be concluded that if this principle is maintained there will not be scope for any more ambitious arrangement with the EU.

7.3 Controlling EU immigration

The insistence on such a principle implies that there would neither be scope for any free movement of persons under the principles of EU law. Thereby also any ambitions to remain in the EU Single Market are excluded.

7.4 Ensuring free trade with European markets

From what has been seen above, it may be concluded that apart from the EEA there is no precedence for a more ambitious and comprehensive FTA for trade in goods and services. Without institutions with strong surveillance and judicial competences there might only be scope for a simple basic FTA for trade in goods like the 1972 one with Switzerland. This is said with reservation for the possibility that the EU could consider the 45 year old Swiss FTA insufficient as a model for a trade agreement with such an important party as the UK, where the volume of trade by far outsizes that with Switzerland.

In its first presentation regarding how it envisages a future customs arrangement with the EU[34] the UK Government sketches out two possible customs-related scenarios, the *first one* "A highly streamlined customs arrangement between the UK and the EU"[35] and the *second one* "A new customs partnership with the EU, aligning our approach to the customs border in a way that removes the need for a UK-EU customs border."[36] Without going into any details here, the

[32] Cf. White Paper pp. 14 and 15.

[33] White Paper paragraph 2.8 further underlines that, unlike decisions made by the CJEU, dispute resolution in the international agreements UK already have concluded does not have direct effect in UK law.

[34] Future customs arrangements – A Future Partnership Paper, published by HM Government on 15.8.2017.

[35] Cf. paragraphs 27 and 28.

[36] Cf. paragraphs 27 and 38.

second option would seem to amount to a *sui generis* new agreement allowing the UK to operate differential tariff regimes, something that certainly would meet great difficulties from a legal point of view.

7.5 A smooth and orderly exit from the EU

The formal negotiations on the British exit from the EU only began on 19 June 2017. So far, one is still at a very initial phase and it may not be expected that more detailed conclusions regarding the exit and the future relationship will be arrived at very soon. As the EU negotiator Michel Barnier, however, repeatedly has underlined, "the clock ticks" towards the 29 March 2019, the two year date after the triggering of Article 50. It is obvious that the time remaining is extremely short, especially taking into account the time needed for ratifications at EU and at national level. It is in this context worthwhile to recall that, if there would be a longer or shorter transitional period providing for the continued application during that time of certain parts of the present EU rules, *EU law and the EU institutional control will continue to apply thereunder*. This would seem to be the reason why recently the imaginative but not very realistic idea was launched, for a time-limited period after the UK has left the EU, to have a continued close association with the EU Customs Union involving "*a new and time-limited customs union*"[37] between the UK and the EU Customs Union based on a shared external tariff and without customs processes and duties between the UK and the EU."[38]

8. CONCLUSION

From the above, a *first conclusion* would concern the specific and unique character of the EU. In its Opinion 1/91 the ECJ recalled: "*The EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based upon the rule of law. The Community treaties established a new legal order for the benefits of which States have limited their sovereign rights, in ever wider fields and the subjects of which comprise not only Member Sates but also their nationals*".[39]

Today the EU Internal Market, 25 years after the completion of the Delors Commission's White Paper program,[40] has become both comprehensive and complex in a way that is without precedent. The areas of the four freedoms are now so interdependent that apart from a full EU Membership there is very

[37] Emphasis added.
[38] Cf. paragraph 48 in the paper mentioned in note 34 above.
[39] Cf. the ECJ in Opinion 1/91, [ECR] 1991, I-6084, paragraph 21.
[40] It is recalled that this was prepared by UK Commissioner Lord Cockfield.

little choice for anyone that would want to access and secure equal treatment and non-discrimination in the Single Market. So far this has only been possible through the EEA, which is the only Agreement that provides the necessary institutional mechanisms.

Through the legal strength of EU law and the very strong EU institutions all EU citizens and economic operators are guaranteed equal treatment and non-discrimination in the Single Market and in the whole of the EEA. It would have been natural to expect, that it would be a priority for the UK Government also to want guarantees for this considerable and most valuable achievement to continue for UK nationals even after an exit from the EU. The UK Government has, however, in its insistence on UK sovereignty, independence and "taking back control", hardly at all addressed this aspect. It would instead seem that the Government is under the impression, that, as long as previous EU acquis is transformed into national UK law, there would be equivalence between EU and UK laws and thus not much to worry about.[41] It does not seem that the UK Government has given much attention to what the EU from a constitutional law point of view must require before it can accept to negotiate a deep and special partnership with the EU.

One very general but fundamental experience from preparing international negotiations is that a party, that only focusses on its own priorities and "red lines" without giving any consideration to what priorities and "red lines" the opposite side might have, will be up for unpleasant surprises. In this context to ignore fundamental constitutional requirements may even be fatal. It is thus most surprising and almost shocking, that a Government of a Member State that extremely actively has participated during soon 45 years in the development of the EU, so far in its position papers almost has ignored to what extent the EU is a Union of law with very strict limits to what it can and what it cannot agree to without running the risk that a deal concluded is found incompatible with the EU Treaties and thus annulled by the CJEU. This is all the more astounding, since in the UK and in its large public administration there was never any shortage of experts extremely well qualified in the field of EU law and the constitutional aspects thereof.

Out of all the different arrangements presented above there is only one, the EEA Agreement, which would provide access to and participation in the EU Internal Market on equal and non-discriminatory conditions. The Swiss example, that may be the one that comes closest to the EEA, is still lacking guarantees for legal certainty and non-discrimination. That is also the reason why the EU has put a break on further developments with Switzerland. To overcome this,

[41] Cf. David Davis, Secretary of State for exiting the European Union, in Preface to the White Paper.

supranational institutions like the ESA and the EFTA Court, which have been decisive for the soon 24 years of success of the EEA, would be needed.

Having from an EU law point of view examined the most relevant arrangements negotiated by the EU during the last 45 years, the overall conclusion as to the answer to the question of which arrangements that may be possible for the UK-EU relations after BREXIT is, that there exists one model, the EEA, that – with its strengths and weaknesses – could provide a possibility for a full participation in the Single Market. As seen by the Swiss case, even a more limited ambition as to the scope of participation therein would, however, require substantial institutions and reciprocal guarantees for equal treatment and non-discrimination, without which the infamous *legal imbalance* would manifest itself.