Trade and Investment post Brexit

Chair
• Professor David Collins, The City Law School, City University London

Speaker
• Sir Daniel Bethlehem KCMG QC, 20 Essex Street
• Kjetil Johansen, DLA Piper Norway DA
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Herbert Smith Freehills
THE BIG QUESTION

Decision Taker or Decision Maker?

Outside or Inside the EU?
STATUS?
WHAT DO WE KNOW?

- "BREXIT means BREXIT!"
- "...people will want to know what Brexit will mean... Simply, it means the UK leaving the European Union!" (Statement by Secretary of State David Davis MP – House of Commons 5 September 2016).
- "Waffle means Waffle!"
- G20 Summit in China: word of caution from Japan and the US.

Nobody can really tell what the consequences will be!

All we know for certain is; it is not clear today, nor tomorrow...

In fact; it is all rather blurry and vague.
MY TASK TODAY

...is to explain to you the Norway-EU relationship and its advantages and disadvantages in the areas of trade and investment
NORWAY – EU/EEA TIMELINE

- 1961: GB, NO, DE and IE apply for EU membership
- 1962: GB application vetoed by FR
- 1963: EFTA is founded: NO, SE, DE, GB, CH, AT, PT
- 1965: NO follows GB and DE
- 1967: NO negative referendum (53.5%)
- 1970: GB, DE and Ireland joins EFTA
- 1972: FR vetoes GB application – ends discussion for NO and DE
- 1973: IS joins EFTA
- 1979: FL joins EFTA, PT – ES joins EU
- 1984: NO follows GB and DE
- 1986: NO negative referendum (52.2%)
- 1989: FL joins EFTA
- 1991: EEA enters into force
- 1992: NO, FR and AT joins EU
- 1994: EEA signed – CH and NO applies CH votes no in referendum
- 2009: EEA enlargement + FMO set up; financial contribution by EEA states to defeat social and economic differences in the enlarged internal market
WHAT IS EFTA TODAY?

EFTA

INTRA-EFTA TRADE RELATIONS
Mostly “maintenance” related work

3RD COUNTRY FTAS
One of the largest networks of preferential free trade agreements in the world > 25 FTAs with 25 partner countries

EEA
(3 OUT OF 4 – CH NOT PARTY)
Securing of stable and homogenous Internal market – onboarding of EU law; 1,600-1,800 implementing and delegated acts annually; 50-70 (basic) legislative acts; EEA in terms of overall EU legislation: approx. 3/4!
WHAT ARE THE “AVENUES”?

- Around 120 bilateral agreements with the EU
- Largely covering the scope of the EEA, but more fragmented:
  - Free movement
  - Air traffic
  - Road traffic
  - Agriculture
  - Technical trade barriers
  - Public procurement
  - Science
  - Security and asylum and Schengen membership
  - Cooperation in fraud pursuits
  - Final stipulations in open questions about agriculture, environment, media, education, care of the elderly, statistics and services
  - No institutional organization to administer/manage relations

- A very comprehensive and advanced FTA
- Creating a homogenous internal market
  - Extending the internal market to cover Norway, Iceland and Liechtenstein
  - The 4 freedoms
  - Common competition and state aid rules
  - Flanking and horizontal policies
  - Financing
  - Shared management and administration
  - Built on a two pillar structure
  - Separate surveillance authority
  - EFTA court
  - Rather what it is.....what is it not?
WHAT DOES THE EEA AGREEMENT NOT COVER?

- Not a Customs Union
- No common Trade Policy
- No common Foreign and Security Policy
- No common Agricultural and Fisheries policy
- No coordination of Justice and Home Affairs
- Not an economic and monetary union
EEA LEGAL STRUCTURE

<table>
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<th>MAIN TEXT</th>
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<tr>
<td>129 Articles</td>
<td>22 Annexes</td>
<td>49 Protocols</td>
<td>1 Final Act</td>
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More than 11,000 EU legal acts have been incorporated into the EEA Agreement since the signing in 1992.

1875 ACTS INCORPORATED AT THE TIME OF SIGNING:
- More than 7,900 acts incorporated by decisions of the EEA Joint Committee
- More than 1,000 acts incorporated by simplified procedure in the veterinary area
**SOME KEY FEATURES OF THE NORWAY – EU RELATION**

- Norway’s sovereign rights are recognised and maintained
- No direct effect of EU legislation:
  - EU legislation incorporated into the EEA
  - EEA acts are implemented into national legal order
- There is a veto right:
  - Only been used once; 3rd Postal Directive (in 2011)
  - Veto lifted in 2013
- Joint bodies:
  - EEA Council
  - EEA Joint Committee
- Consultative committees:
  - EEA Joint Parliamentary Committee
  - EEA Consultative Committee
  - Built on a two-pillar system
EEA TWO-PILLAR STRUCTURE

EFTA – PILLAR
- EFTA’s Committee
- ESA
- EFTA Court

EEA
- EEA Council
- EEA Committee
- Parliamentary Committee
- Consultative Committee

EU – PILLAR
- Council
- Commission
- Parliament
- Court
EEA DECISION MAKING

NATIONAL LEGAL ORDER IMPLEMENTATION → EEA JOINT COMMITTEE DECISION

STANDING COMMITTEES → EEA JOINT COMMITTEE

EFTA WORKING GROUPS → FORMAL NEGOTIATIONS

WORKING GROUP DRAFT JOINT COMMITTEE DECISION → INFORMAL NEGOTIATIONS

TECHNICAL OR SUBSTANTIAL ADAPTATIONS? → EFTA WORKING GROUPS

EU → EUROPEAN EXTERNAL ACTION SERVICE

EU COMMISSION EXPERTS
ENFORCEMENT OF EEA COMMITMENTS

- State Aid
  - Same limitations, same possibilities, same procedures
  - Enforcement action; breach by state, financial impact for illegal aid – beneficiary picks up the bill
- A private party – lawsuit for national courts (possible submission)
- The EEA institutions (monitoring the agreement/implementaiton): on its own initiative (ex officio); complaint from a private part; or submission
  - The EFTA Court, consisting of three judges, gives advisory opinions (upon requests lodged by national courts) and is the body of appeal for EEA.
  - A “miniature version” of the EU Court in Luxembourg
- Lack of implementation – the EEA Agreement Article 3 – E-2/08, EFTA Surveillance Authority v. The Republic of Iceland, paragraph 12:
  “…imposes upon the Contracting Parties the general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EEA Agreement”
- Consequences of breach:
  - Void law or decision; breach of treaty (ESA – EFTA Court); and/or compensation (Rt. 2005 s. 1365 (Finanger II) – Supreme Court)
IS THE EEA FOR FREE?

- No (direct) payment for participation in the internal market, but pays to participate in:
  - EU’s program and agency cooperation
  - Schengen
  - EEA-funding for social and economic equality in EU:
    - Norway’s yearly contribution 2014-2021 will be around 350 million euro (2.8 billion euro 2014-2021)
    - Equals around 96% of the EEA-funding
EEA & MIGRATION/FREEDOM OF MOVEMENT

Freedom of movement fundamental part of the EEA agreement. In essence, the EEA is all about the 4 freedoms.

- Migration:
  - Close cooperation with EU
  - Norway directly affected by migrant politics in EU
  - Through the Schengen agreement and Dublin cooperation Norway participates in the cooperation of border control, visa and asylum
    - Schengen agreement: Schengen border control and rules on visa
      - Norway contributes to the Schengen border control agency Frontex
    - Dublin cooperation: governs which country that has the responsibility for asylum applications
      - Norway participates in the renewal of the Dublin cooperation
      - Norway can in certain circumstances forward a received application on asylum to another country
      - Norway’s position is to strengthen the cooperation with EU regarding return of people who do not have a need for protection
ADVANTAGES VS. DISADVANTAGES FOR BUSINESSES

ADVANTAGES
- Market access – predictable terms – sustainable and long term
- EEA internal market – business may rely on the EEA home state presence (i.e. passporting rights)
- Homogenous rules/harmonization
- Aligned rules of competing on the market

DISADVANTAGES
- Lack of influence
- The price we pay for market access
- EEA vulnerable to change; best in class in implementing
- EFTA court often deals with novel, unresolved EU internal market matters
- Customs co-operation; still room for improvement
ONE SIZE FITS ALL?

You must decide what Brexit means for you! Once you’ve made up your mind, others will tell you their views...

- How will you treat migration and right of movement of persons?
- “We can create an immigration system that allows us to control numbers and encourage the brightest to come to this country.” (Statement by Secretary of State David Davis MP – House of Commons 5 September 2016)
- Norway agenda:
  - EEA “peace” and no disturbance – what we have works well – don’t mess it all up
- Will EU be capable of managing well three different levels of EEA partnership integration models?
  - EU-CH
  - EU-UK and
  - EU-EEA relations?
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TRADE AND INVESTMENT POST BREXIT
IMPACT OF BREXIT ON EXISTING AND PENDING INVESTMENT AGREEMENTS

12 SEPTEMBER 2016

Iain Maxwell, Of Counsel, +44 20 7466 2646, iain.maxwell@hsf.com
STATUS OF EU TRADE AND INVESTMENT AGREEMENTS

• A large number of trade and investment treaties with third countries involve the EU, at various stages of negotiation, signature and ratification

• Two broad categories of EU treaties:
  – Exclusive competence
  – Mixed agreements
WHAT WILL HAPPEN TO EU EXCLUSIVE COMPETENCE AGREEMENTS?

• EU as an entity is a party to the agreement

• **Individual Member States are not parties to the agreement**

• Simple notification on the part of the EU of the UK’s exit likely to be sufficient
WHAT WILL HAPPEN TO SHARED COMPETENCE / MIXED AGREEMENTS (1) ?

• EU and individual Member States parties to the agreement

• More complex question

• UK will remain party in name, but depending on its terms some or all of the agreement may no longer be applicable in the UK:
  
  — Delineation of competence between EU and Member States
  — Territorial provisions linked to territory of the EU
WHAT WILL HAPPEN TO SHARED COMPETENCE / MIXED AGREEMENTS? (2)

• A number of potential options may be pursued by the UK:

  ➢ Formal declaration of intention to **assume all obligations** under the agreement in its own right

  ➢ **Amendment to territorial scope** of the agreement

  ➢ Negotiation of **new agreements** with relevant third countries
IMPACT ON EXISTING INVESTMENT AGREEMENTS

• Limited impact on existing investment agreements:

  ➢ **Energy Charter Treaty** is a mixed agreement, and remains in force for the UK

  ➢ **Existing FTAs** (eg South Korea, Peru) did not generally terminate existing BITs. UK has BITs with South Korea and Peru
WHAT IS THE IMPACT FOR PENDING INVESTMENT AGREEMENTS?

• Number of agreements negotiated, but not yet in force / ratified

• **Key issue = effect on existing UK BITs** with relevant third countries

• EU / Singapore FTA:
  
  “Upon the entry into force of this Agreement … the agreements between Member States of the European Union and Singapore listed in Annex 9-D … shall cease to have effect and shall be replaced and superseded by this Agreement” (Art 9.10(1))

• **Intended to terminate existing BITs.** UK unlikely to want to do so
WHAT IS THE IMPACT FOR PENDING INVESTMENT AGREEMENTS?

- Possible solution: temporary suspension of BITs

- Complex considerations to be negotiated:
  - **Sunset provisions**
  - **Timing**: if breach before BREXIT, but claim brought after BREXIT, which treaty applicable?
  - **Procedure**: should EU still determine appropriate Respondent?
  - Differing **levels of protection**

- Simpler solution: **UK BIT remains in force for set period of time**
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Roundtable

Chair: Iain Maxwell, Herbert Smith Freehills

- Jiries Saadeh, Fietta
- Iain MacVay, King & Spalding
- Bernhard Maier, DLA Piper
- Matthew Weiniger, Linklaters

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12 September 2016, BIICL