

Brexit, the EEA and the EU State aid Rules

The Future of State aid Control in Turmoil?

*Maria Segura, Egill Olafsson and Marianne Clayton**

One of the many and still unresolved questions raised by the discussions surrounding Brexit is that of its implications on State aid rules. The consequences for the UK and for both the EU and the European Economic Area are still unknown. The options are diverse and still open to much speculation. In this article, we will focus on the EEA model. Because it is not that well-known, the scope of the EEA agreement and the way it functions will firstly be presented. Indeed, some specificities of the EEA framework, amongst which the principle of homogeneity, deserve explanations as a cornerstone for the application of State aid rules within the EU and the EEA. Finally, the actual different options regarding State aid control post-Brexit within the UK, EU and EEA will be discussed. To conclude, attention will be devoted to the concerns regarding the continuation of the EEA Agreement as it stands and the future homogeneous application of State aid rules.

Keywords: State aid control; Brexit; Homogeneity principle.

I. State aid Control Today: Multiple Options and Models

In 2016, one of the Managing Editors of this publication, José Luis Buendía, published an editorial with the title ‘Brexit, a stress test for State aid control?’.¹ He described a landscape of State aid control characterised by a variety of options. Models range from the Europe Agreements with candidate countries which foresee the incipient application of State aid rules ‘à la façon’ European Union, to the provisions regarding subsidies contained in Free Trade Agreements such as CETA, without disregarding the ongoing discussions with Switzerland on the possible incorporation of State aid rules. This panoply could be further enlarged with whatever option will apply to

State aid control, if any, once the UK leaves the Union, if it happens.

Since the United Kingdom invoked Article 50 of the Treaty on European Union (TEU), numerous articles have been published on a wide variety of issues relating to the potential political, economic and legal consequences of ‘Brexit’. Indeed, the impact of this unprecedented step both for the UK and the EU is difficult to predict. In the field of State aid, a ‘hard Brexit’, where the United Kingdom would abandon the EU State aid rules, negotiate a free trade agreement with the European Union, and/or even adopt its own national State aid rules, has been opposed to a ‘soft Brexit’ implying that the United Kingdom would continue to apply the EU State aid rules or join the EEA Agreement.

The political uncertainty surrounding Brexit is striking. In this sensitive political scenario, whose outcome and legal and economic consequences are simply unforeseeable, this contribution is not merely about Brexit. It was originally triggered by the overarching scenario of the UK leaving the Union and the possibility that a new model regarding the assessment of the grant of State aid by national authorities would arise, which would unavoidably impact State aid control mechanisms currently in place. It sought

DOI: 10.21552/estal/2019/1/3

* The authors are lawyers at Clayton & Segura, Brussels. A summary of this paper was presented at the conference ‘State Aid Control: Where Law and Economics Meet’, organized by Prof. Dr. Caroline Buts and Lexion Publisher, in cooperation with the Vrije Universiteit Brussel and E.CA Economics. Brussels, 5 October 2018.

¹ J L Buendía, ‘Brexit, a Stress Test for State aid Control?’, (2016), EStAL 3/2016 volume 15, Editorial page 331.

to provide some information about the homogeneous application of State aid rules within the European Economic Area (EEA). It also raises the question of whether an autonomous, new, creative approach regarding State aid control in the UK (or alternatively the absence of any State aid rules) could jeopardise this homogeneity and the level playing field achieved throughout the EEA to the detriment of undertakings, national authorities and ultimately the tax payers. Could a multiplicity of different, often softer, regimes influence the unique State aid control system enshrined in the Treaty on the Functioning of the European Union and weaken its application?

II. The European Economic Area: Close to the Union but Fundamentally Different

The most advanced and far-reaching form of agreement signed by the European Union and its Member States concerns the Agreement on the European Economic Area.

1. The EEA as an Extension of the Internal Market

The EEA Agreement is an international agreement that enables the three EFTA States (Iceland, Liechtenstein and Norway) to participate fully in the single market. It was conceived at the end of the 1980s to extend the single market to the EEA EFTA States.² It is an alternative to the supranational European Communities. It was signed on 2 May 1992 and entered into force on 1 January 1994 thereby establishing the European Economic Area (EEA). Article 1(1) of the EEA Agreement states that its aim is

to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition, and the respect of the same rules, with a view to creating a homogeneous European Economic Area.

‘Homogeneous’ means that common rules are essential.

In order to attain this objective, paragraph 2 of Article 1 of the EEA Agreement records that it en-

tails provisions regarding the free movement of goods, persons, services and capital and sets up a system ensuring that competition is not distorted and that such provisions are respected. In addition, a closer cooperation amongst the Contracting Parties is foreseen in other fields such as research and development, the environment, education and social policy.

The EEA Agreement is based on the relevant primary legislation of the EU at the time it was adopted, namely the Treaty of Rome. It has not been substantially amended since it was adopted which may *prima facie* seem static. The EEA Agreement has nonetheless proven to be a dynamic instrument which is continuously updated with new EU legislation to ensure that the rules of the single market are the same across the EEA. This makes it fundamentally different from traditional free trade agreements, which focus on tariffs and improved access to each party’s markets. The EEA Agreement instead gives all the participating countries a (still) 31-country home market.

The EU rules do not have direct effect in the EFTA EEA Member States but must be incorporated into the EEA Agreement by way of a separate decision adopted by the Joint EEA Committee. This Committee is a reflection of the two-pillar structure of the EEA and comprises representatives of the EU and the EFTA EEA countries.

The institutional framework of the EEA consists of two pillars: on the one hand, the EU and its institutions, and on the other hand, the EEA EFTA bodies mirroring the EU institutions. Through a number of joint institutions, the 31 (soon to be 30) Member States jointly implement the EEA Agreement. This structure is necessary as the EEA EFTA States have not transferred any legislative competences to the EU or the joint EEA bodies. For this reason, and despite the procedures in place to consult national parliaments well ahead, the need for parliamentary approval may delay the date of entry into force of a joint committee decision incorporating EU legislation, since all EEA EFTA States must fulfil all constitutional requirements. Moreover, as a main rule, the EEA EFTA States are constitutionally precluded from ac-

² Switzerland is a member of the European Free Trade Association (EFTA), but not the EEA Agreement. The other three EFTA States (Iceland, Liechtenstein and Norway) are often referred to as the EEA EFTA States.

cepting binding decisions from the EU.⁴ This constitutes a fundamental feature within the EEA structure and has played an important role in its establishment and the way it is perceived and accepted in the EU and EEA EFTA Member States.

The role of these institutions is thus pivotal to ensure homogeneity. This is, in particular, the case regarding the mechanism for incorporating EU acts into the EEA Agreement, which is done by means of a decision of the EEA Joint Committee. Such decisions may contain adaptations to the specificities within the EEA. For instance, if the act contains provisions conferring competences to an EU institution, specific adaptations are required to replace it with 'the EEA EFTA States' or the 'EFTA Surveillance Authority'.³

The EEA Agreement does not grant the EEA EFTA States access to the decision-making process within the European institutions but officially provides for their input at various stages of the preparation of legislation which is relevant in the EEA context. This input can be provided through the participation in expert groups and committees of the European Commission or by way of comments on upcoming legislation.

The EEA 'two-pillar structure' has a separate enforcement and dispute resolution mechanism for the EEA EFTA States: the EFTA Surveillance Authority (ESA) and the EFTA Court. ESA has powers corresponding to those of the European Commission and

ensures that the EEA EFTA States respect their obligations under the EEA Agreement. The EFTA Court is responsible for the judicial control of the EEA EFTA States while the Court of Justice of the European Union exercises judicial control over the EU Member States.⁵ Their role is ultimately to ensure that EU rules, once they are incorporated into the EEA Agreement, are applied in the same way in Norway, Iceland and Liechtenstein as in the EU. This is crucial to ensure a level playing field across the EEA and legal certainty for economic operators, as well as individual citizens.

2. Some Relevant Specificities Concerning the EEA

The EEA Agreement provides for a common market for the 31 participating countries which is a unique design. It is however fundamentally different from the EC Treaty and its successor, the Treaty on the Functioning of the European Union (TFEU).

The EEA Agreement, as opposed to the TFEU, does not cover the common agriculture and fisheries policies, common trade policy, common foreign and security policy, justice and home affairs, direct and indirect taxation or Economic and Monetary Union. But the EEA legislation includes EU food safety, veterinary and phyto-sanitary rules and standards. It includes the REACH legislation and other relevant legislation in areas such as energy, environment, transport etc. These rules are very important to ensure a smooth functioning of the common market.

As regards the substance of the EEA Agreement and its peculiarities compared to the EU, it is particularly worth stressing that the EEA EFTA States have not transferred any legislative power to the EEA Joint Committee. Therefore, sometimes Joint Committee Decisions cannot enter into force until the national parliament(s) have approved. This is reflected in Article 103 of the EEA Agreement.

The EEA Agreement does not establish a customs union⁶ and it contains provisions on rules of origin set out in Article 9 of the EEA Agreement and Protocol 4 to the Agreement.⁷ Therefore, the EEA EFTA States are free to set their own tariffs and to conclude free trade agreements with third party States. A recent example is the free trade agreement between Iceland and China, the first free trade agreement China has concluded with a European country.⁸

4 See further: The two-pillar structure of the EEA: incorporation of new EU legal acts. Available at <<https://www.efta.int/sites/default/files/documents/eea/16-532-the-two-pillar-structure-incorporation-of-new-eu-acts.pdf>>, accessed 21 February 2019.

3 See further: How EU acts become EEA acts and the need for adaptations. Available at <<http://www.efta.int/media/documents/eea/1113623-How-EU-acts-become-EEA-acts.pdf>> accessed 21 February 2019.

5 See further: The two-pillar structure of the EEA – Surveillance and judicial control. Available at <<https://www.efta.int/sites/default/files/documents/eea/eea-institutions/The-Two-Pillar-Structure-Surveillance-and-Judicial-Control.pdf>>, accessed 21 February 2019.

6 The issue of the customs union is also part of the recurring discussion within Brexit. See House of Commons, Library. Briefing Paper Number 8129, 21 December 2018, The European Economic Area. Available at <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8129>> page 5, accessed 21 February 2019.

7 Available at <<http://www.efta.int/sites/default/files/documents/legal-texts/eea/the-eea-agreement/Protocols%20to%20the%20Agreement/protocol4.pdf>>, accessed 21 February 2019.

8 See further: <<https://www.government.is/news/article/2014/01/30/Parliament-adopts-Iceland-China-Free-Trade-Agreement/>> and <https://www.government.is/media/utanrikisraduneyti-media/media/fta-kina/China_fact_sheet_enska_15042013_Final.pdf>, accessed 21 February 2019.

In addition, the EEA EFTA States can join in agreements signed within the EU, with other Member States. A particularly relevant example is the Schengen Agreement which authorises the free circulation of persons to many countries within the EU, as well as to the three EEA EFTA States Iceland, Liechtenstein and Norway. They participate in different EU programmes from research to science or education, the most famous of which probably being Horizon 2020 and Erasmus.

What has most often been referred to as the major disadvantage of the EEA Agreement is that the EEA EFTA States do not have a say in the rules adopted by the EU.⁹ Although the EEA EFTA States do not have representatives in the EU bodies, they can participate in shaping the legislation at the early stages.¹⁰ As mentioned above, Article 99 of the EEA Agreement sets out that the Commission shall informally seek advice from experts from the EEA EFTA States in the same way as it seeks advice from the EU Member States. Additionally, when transmitting a legislative proposal to the Council, the Commission shall also transmit copies thereof to the EEA EFTA States. If one of the Contracting Parties to the EEA Agreement so requests, they are to consult each other at significant moments in the phase preceding the decision of the Council. Finally, the Contracting Parties shall cooperate in good faith during the information and consultation phase with a view to facilitating, at the end of the process, the decision-taking in the EEA Joint Committee.

The EEA EFTA States participate in various types of committees and programmes.¹¹ For instance, in the field of competition, the EEA EFTA States and ESA can formally participate in the Advisory Committee when discussing draft decisions. The EEA EFTA States and the EFTA Surveillance Authority also participate in the European Competition Network.

Outside of the EEA Agreement but as part of a permanent co-operation with the EU, the EEA Grants also contribute to regional development and economic and social cohesion throughout the EEA in a manner similar to the Structural Funds.

The EEA Agreement also contains a separate exit clause in Article 127:

Each Contracting Party may withdraw from this Agreement provided it gives at least twelve months' notice in writing to the other Contracting Parties. Immediately after the notification of the intended withdrawal, the other Contracting Par-

ties shall convene a diplomatic conference in order to envisage the necessary modifications to bring to the Agreement.

This provision is relevant in the current scenario of Brexit. There is indeed no provision in the EEA Agreement requiring an EEA State to leave if it ceases to be a member of the EU or the EFTA, but there is a strong and clear assumption that only EU or EFTA States can be members.¹²

Indeed, as the term Contracting Party, as defined in Article 2 of the EEA Agreement, refers to EC Member States, the UK will automatically fall out of scope of the Agreement once it has left the EU. A legal discussion has taken place regarding the need to trigger Article 127 of the EEA Agreement in addition to Article 50 TEU.¹³ Therefore, an Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom's membership of the European Union was agreed in December 2018.¹⁴

9 A frequent claim is also made that the EEA EFTA States adopt 'almost all' EU legislation without a say. In a recent report commissioned by Minister of Foreign Affairs in Iceland, it is stated that from 1994 to 2016, 13.4% of EU acts (including acts that do not fall within the scope of the EEA Agreement) have been incorporated in the EEA Agreement. Available at <<https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=45f59b71-3f1b-11e8-942b-005056bc530c>>, accessed 21 February 2019.

10 In the same report as referred to above, it is stated that the Icelandic Foreign Services (i. Utanríkisþjónustan) present the view of Iceland in the EU legislative process, it observes ongoing issues in the EU institutions that are relevant to Iceland, it negotiates necessary adjustments of acts that are to be incorporated in the EEA Agreement and solves potential issues that Icelandic companies or citizens might face in the EEA.

11 See for instance <<http://www.efta.int/eea/eu-agencies>> and <<http://www.efta.int/eea/eu-programmes>>, accessed 21 February 2019.

12 See House of Commons, Library. Briefing Paper Number 8129, 21 December 2018, The European Economic Area. Available at <<https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8129>>, accessed 21 February 2019.

13 Regarding the legal question of whether the EEA stops applying to the UK as a result of Brexit and the implications of the possible interpretations see in particular C Hillion, 'Brexit means Br(EEA)xit: the UK withdrawal from the EU and its implications for the EEA', (2018), CMLR 55, 135-156.

14 Available at <<https://www.efta.int/EEA/news/EEA-EFTA-Separation-Agreement-UK-reached-511351>>, accessed 21 February 2019.

In this context, reference must be made to Article 126 of the EEA Agreement which states that the Agreement applies only to the territories of the EU in addition to Iceland, Norway and Liechtenstein. Article 128 of the EEA Agreement sets out:

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.

Consequently, to join the EEA Agreement after leaving the EU, the UK would first have to become a member of EFTA.¹⁵

3. The Principle of Homogeneity

Some scholars have referred to the EEA Agreement as an international treaty *sui generis* which establishes a distinct legal order. Emphasis has been put on the differences between fundamental principles such as primacy and direct effect in EU law as opposed to quasi-primacy and quasi-direct effect of EEA law.¹⁶

There are however two fundamental principles of law that govern the EEA Agreement and ensure the existence and proper functioning of the common market and which are particularly worth mentioning: homogeneity and reciprocity.¹⁷ These principles imply that even though the EEA and the EU constitute two separate legal orders, they are very closely

linked and intertwined. The principle of reciprocity must ensure the same rights in both pillars when it comes to remedies, whereas the principle of homogeneity aims apply rules which must be identical and developed in a homogeneous manner, so as to ensure the proper functioning of the market.¹⁸

The principle of homogeneity deserves special attention. It is reflected in the text of the EEA Agreement, whose preamble sets out:

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 of competition.

Moreover, Articles 58, 62, 105, 106 and 109 of the EEA Agreement concern the cooperation of EU and EEA bodies in order to ensure a uniform interpretation throughout the EEA.

The EFTA Court has on several occasions referred to this fundamental principle. In *EFTA Surveillance Authority v The Kingdom of Norway*, the EFTA Court stated:

The principle of homogeneity enshrined in the EEA Agreement leads to a presumption that provisions framed identically in the EEA Agreement and the EC Treaty are to be construed in the same way. There are certain differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty which may under specific circumstances lead to a different interpretation.¹⁹

In an earlier judgment, the EFTA Court also recognised:

Admittedly, there are differences in the scope and purpose of the EEA Agreement as compared to the EC Treaty, and it cannot be ruled out that such differences may, under specific circumstances, lead to differences in the interpretation [...]. But where parallel provisions are to be interpreted without any such specific circumstances being present, homogeneity should prevail.²⁰

It is mainly on the basis of the homogeneity principle, whose enforcement can only be guaranteed through cooperation, that a smooth and consistent

15 See Article 56 of the Convention establishing the European Free Trade Association. Available at <<http://www.efta.int/sites/default/files/documents/legal-texts/fta-convention/Vaduz%20Convention%20Agreement.pdf>>, accessed 21 February 2019.

16 See Michael-James Clifton, 'EEA: Another side to Europe'. Available at <<http://www.monckton.com/wp-content/uploads/2016/11/EEA-Another-Side-to-Europe-Clifton.pdf>>, accessed 21 February 2019.

17 See Case C-12/16 *EFTA Surveillance Authority v Iceland* [2014] EFTA Ct Rep 58, [68].

18 See Michael-James Clifton, 'EEA: Another side to Europe'. Available at <<http://www.monckton.com/wp-content/uploads/2016/11/EEA-Another-Side-to-Europe-Clifton.pdf>>, accessed 21 February 2019.

19 EFTA Court judgment of 26 June 2007, E-2/06, *EFTA Surveillance Authority v The Kingdom of Norway*, [2007] EFTA Ct. Rep. 164, [59].

20 EFTA Court judgment of 10 December 1998, E-3/98 *Herbert Rainford-Towning*, [1998] EFTA Ct. Rep. 205, [21].

functioning of the rules applicable in the European Economy Area required for the proper implementation of the internal market can continue being a reality.

III. State aid Control Within the European Economic Area

Due to the two pillar structure that governs the EEA Agreement, the control of the grant of State aid within the EEA must also distinguish the EU and the EEA EFTA pillars.

1. Brief Overview of the State aid Provisions Applicable in the European Union

The rules regarding State aid control have been part of the treaties since the inception of the European Economic Community. Article 107(1) TFUE foresees the general prohibition to grant State aid and has not been amended throughout time. This provision also contains exemptions to the general prohibition to grant State aid. Article 107(2) refers to State aid that is considered compatible due to its social character, to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Article 107(3) refers to aid that can be considered compatible following the assessment by the Commission. This provision covers measures of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State, aid to facilitate the development of certain economic activities or of certain economic areas and aid to promote culture and heritage conservation. It was amended for the last time in 1992 at the time of the adoption of the Maasticht Treaty to incorporate the cultural exemption. In addition, Article 107(3) contains an open clause concerning under lit. (e) 'such other categories of aid as may be specified by decision of the Council on a

proposal from the Commission.' The interpretation and application of the material provisions regarding State aid have been at the origin of the different guidelines and notices that the Commission has issued over the years.²¹ The Notice on the notion of State aid merits special attention.²²

The powerful procedural construction surrounding the provisions of State aid control and the competence of the Commission to exercise its review was laid down in Article 108 TFUE. It compels Member States to notify to the Commission any plans to grant or alter State aid and includes a standstill obligation to prevent them from implementing the measure before the Commission has carried out its assessment as to whether the notified measure entails the grant of compatible State aid.

The procedural rules have been further developed partly codifying the case law of the European Courts within the Procedural Regulation²³ as well as the Implementing Regulation.²⁴

2. State aid Control in the EEA EFTA Pillar

a. Nearly Identical State aid Rules but a Different Material Scope

The text of the EEA Agreement is based on the Treaty of Rome and the wording of the relevant provisions regarding the four freedoms, competition and State aid is therefore largely the same. The wording of Article 61(1) of the EEA Agreement is identical to that of Article 107(1) TFEU concerning the definition of State aid.

The same is true for Articles 107(2) TFEU and 61(2) EEA Agreement.

The wording of paragraph 3 varies however in Article 107 TFEU and 61 EEA Agreement. Article 107(3)(d) TFEU foresees a cultural exception:

21 <http://ec.europa.eu/competition/state_aid/legislation/legislation.html> accessed 21 February 2019.

22 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719\(05\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016XC0719(05)&from=EN)> accessed 21 February 2019.

23 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, 9.

24 Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets OJ L 325, 10.12.2015, 1–180.

aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest

may be considered compatible with the common market. The ‘cultural exemption’ was introduced in 1992 with the Maastricht Treaty, the only occasion where a State aid provision of the Treaty was modified. Even though the Maastricht Treaty was signed on 7 February 1992 and the EEA Agreement three months later, on 2 May 1992, the text was not amended to introduce this change. Thus, from its inception, cultural aid is assessed by ESA pursuant to Article 61(3)(c) of the EEA Agreement.

The last paragraph of Articles 107(3) TFEU and 61(3) EEA Agreement also has a different wording. Whilst under Article 107(3)(e) ‘such other categories of aid as may be specified by decision of the Council on a proposal from the Commission’ may be considered compatible, Article 61(3)(d) EEA Agreement refers to ‘the categories of aid that may be specified by the EEA Joint Committee in accordance with Part VII.’ It is important to note that Chapter 3 of Part VII concerns ‘Homogeneity, Surveillance Procedure and Settlement of Disputes’.

The principle of homogeneity also applies to the State aid rules, and as the substantive provisions are almost identical, they should be applied in a uniform manner in the EU and the EEA as provided by the EEA Agreement. The objective of homogeneity when it comes to State aid is also reflected in the Guidelines ESA has adopted, which are identical to those adopted by the Commission. The most recent example is the Communication regarding the Notion of State aid, which, in the EEA version, contains some additional references to relevant case law of the EFTA Court.

It must be noted however that there are important differences when it comes to the application of the EEA State aid rules resulting from the product scope of the EEA Agreement. Deriving from Article 8 of the EEA Agreement, the Agreement does not apply to agriculture and fisheries, and therefore the State aid rules do not apply to such products/those areas

The EFTA Court has recently dealt with the application of the State aid rules to fisheries and agriculture. In *Marine Harvest ASA v EFTA Surveillance Authority*, the EFTA Court upheld ESA’s decision rejecting a complaint on the basis that it did not have the competence to assess State aid to the fisheries sector. The EFTA Court stated that the aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties, but there are certain differences in the scope of the EEA Agreement when it comes to agriculture and fisheries products. Although there are special rules relating to aid to fisheries deriving from Article 20 of the EEA Agreement and Article 4 of Protocol 9 to the EEA Agreement,²⁵ those rules do not fall under the general system of enforcement by ESA but rest on the Contracting Parties. The EFTA Court therefore concluded that ESA is not authorised to perform surveillance of State aid in the fisheries sector.²⁶

In *Synnøve Finden AS v Staten v/Landbruks- og matdepartementet*, the EFTA Court dealt with the product scope of the EEA Agreement with respect to agriculture. As a general rule, liquid milk products fall out of scope of the EEA Agreement. However, flavoured yogurt is listed specifically in Protocol 3 to the EEA Agreement and therefore falls within the product scope. In the case at hand, a distribution subsidy was granted to both products falling within and outside the product scope of the EEA Agreement. Again, the EFTA Court noted that there are certain differences in the scope of the EEA Agreement. However, the EFTA Court found that:

[...] in the event that a State aid measure is inseparably linked to certain products not exclusively outside the scope of the EEA Agreement, the aid measure as a whole must be notified to ESA.²⁷

b. Procedural Aspects

The procedural rules on State aid applicable to the EFTA pillar corresponding to Article 107 TFEU are

25 Article 4 of Protocol 9 to the EEA Agreement states: ‘1. Aid granted through State resources to the fisheries sector which distorts competition shall be abolished 2. Legislation relating to the market organisation in the fisheries sector shall be adjusted so as not to distort competition. 3. The Contracting Parties shall endeavour to ensure conditions of competition which will enable the other Contracting Parties to refrain from the application of anti-dumping measures and countervailing duties’.

26 EFTA Court judgment of 27 November 2017, E-12/16, *Marine Harvest ASA v EFTA Surveillance Authority*. Available at <http://www.eftacourt.int/uploads/tx_nvcases/12_16_Judgment.pdf>, accessed 21 February 2019.

27 EFTA Court judgment of 15 December 2016, E-01/16, *Synnøve Finden AS v Staten v Landbruks- og matdepartementet*. Available at <http://www.eftacourt.int/uploads/tx_nvcases/1_16_Judgment_EN.pdf>, accessed 21 February 2019.

to be found in Part I of Protocol 3 to the SCA. These rules mirror those laid down in the previously applicable Procedural Regulation No. 659/1999 in the EU,²⁸ which is no longer in force. The Procedural Regulation which is currently applicable within the EU (Regulation 2015/1589) was adopted on 13 July 2015 and includes amendments originally made to Regulation 659/1999 by Regulation 734/2013.²⁹ These amendments introduced, *inter alia*, stricter requirements for complainants requiring them to demonstrate that they are interested parties, as well as the power of the Commission to request information made to other sources.

These amendments were never incorporated into the EEA Agreement.³⁰ However, the new Procedural Regulation is under consideration by the EEA Joint Committee and there is a draft decision on its incorporation into the EEA Agreement dated 17 October 2016.³¹ Because of the delays in the incorporation of legislation, there are obvious procedural differences that currently apply to ESA and the Commission and will continue to do so until the new Regulation is adopted in the EFTA pillar.

c. Jurisdiction

According to Article 62 of the EEA Agreement, the Commission enforces EU State aid rules towards the EU Member States, whereas ESA enforces EEA State aid rules towards the EEA Member States.

In competition cases, it is possible that either ESA or the Commission has the jurisdiction to handle them, which must be decided on a case-by-case basis pursuant to Articles 56 and 57 of the EEA Agreement. State aid control is however based on the Member State granting the aid, and therefore ESA has the competence to assess State aid cases which concern Iceland, Norway and Liechtenstein.

However, there are cases which concern more than one Member State. This happened for instance for the financing of Scandinavian Airlines through the new Revolving Credit Facility which concerned Norway, Denmark and Sweden. In this case, ESA adopted a decision vis-à-vis Norway, whereas the Commission adopted a separate decision in the same case relating to Denmark and Sweden. In its decision, ESA stated:

For this procedure, the Authority, pursuant to Article 109(1) of the Agreement on the European Economic Area (EEA Agreement) in conjunction with

Article 24 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, is competent to assess whether the provisions of the EEA Agreement have been complied with by Norway. On the other hand, the Commission is solely competent to assess whether the provisions of the Treaty on the Functioning of the European Union (TFEU) have been respected by Denmark and Sweden. Also, on the basis of Article 109(2) and Protocol 27 to the EEA Agreement, in order to ensure a uniform application throughout the EEA, the Authority and the Commission shall cooperate, exchange information and consult each other on surveillance policy issues and individual cases. In the light of the above and given the parallel competence of both institutions in the present case, the Authority has cooperated and consulted with the Commission before adopting the present decision.³²

The same statement can be found in the Commission's decision.³³

IV. Possible Impact of Brexit on the Future Homogeneity of State aid Control

In the many articles that have been published relating to Brexit, the perspectives taken often relate to the routes available to the UK and compares them from the political, economic and legal perspective.

28 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 83, 27.3.1999, 1–9.

29 Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 204, 31.7.2013, 15–22.

30 See <<http://www.efta.int/eea-lex/32013R0734>>, accessed 21 February 2019.

31 See <<http://www.efta.int/eea-lex/32015R1589>>, accessed 21 February 2019.

32 EFTA Surveillance Authority Decision of 9 July 2014 No. 273/14/COL, on the financing of Scandinavian Airlines through the new Revolving Credit Facility, recitals 7-8. Available at <<http://www.eftasurv.int/media/decisions/273-14-COL.pdf>>, accessed 21 February 2019.

33 European Commission Decision of 9 July 2014 in case No. SA.35668, SAS new Revolving Credit Facility, C(2014) 4532 final Available at <http://ec.europa.eu/competition/state_aid/cases/249053/249053_1582733_212_2.pdf>, accessed 21 February 2019.

It is worth having a look at the evolution of the discussions regarding the application (or not) of State aid rules in the UK throughout the last year.

On 19 March 2018, a draft withdrawal agreement was published.³⁴ In Article 9 of the Protocol on Ireland/Northern Ireland to the draft Withdrawal Agreement, it was set out that provisions of Union law on State aid will apply to the United Kingdom in respect of Northern Ireland.³⁵ Article 12 of the Protocol on Ireland/Northern Ireland in the Agreement on the withdrawal endorsed by the European Union and the United Kingdom still reads that

the provisions of Union law in Annex 8 to this Protocol shall apply to the United Kingdom, including with regard to measures supporting the production of and trade in agricultural products in Northern Ireland, in respect of measures that affect that trade between the part of the territory of the United Kingdom.

In a House of Lords report, the situation of State aid and Brexit was elaborated on as follows:³⁶

The UK will have significant decisions to make with regard to future State aid policy, as the EU's extensive competence in this area leaves a limited national framework to fall back on. It is likely that the EU will insist on some form of State aid controls in any UK-EU Free Trade Agreement (FTA). If this is not case, the World Trade Organization's (WTO) Agreement on Subsidies and Countervailing Measures (ASCM) would not represent an adequate alternative. The ASCM has no domestic ap-

plication and therefore would not regulate State aid within the UK, creating the risk of intra-UK subsidy races.

The Minister confirmed that the Government had not yet arrived at a settled State aid policy, although it was mindful of the need to have one before 'day one' of Brexit. As introduced, the EU (Withdrawal) Bill would preserve a general prohibition on State aid without specifying what body would assume the Commission's current role of reviewing and approving compatible measures. We urge the Government to address this omission as soon as possible and clarify whether State aid responsibilities will be assumed by an existing, or new, authority.

It will be important for the Government to involve, and secure the support of, the devolved administrations in determining the shape of this future State aid regime, and the UK's wider post-Brexit institutional framework for competition matters. In developing this framework, the UK will have the opportunity to address criticisms of complexity and bureaucracy facing the current EU competition regime, and to create a system more focused on domestic needs and priorities. To inform its policy in this regard, the Government should launch a consultative process, involving the devolved administrations, local authorities, and other stakeholders such as businesses and consumer groups. We hope this report will be a useful contribution to that endeavour.

In a letter from Andrew Griffiths MP, Minister for Small Business, Consumers & Corporate Responsibility sent in March 2018, it was stated that it is the Government's view that the UK should be prepared to establish a full UK-wide subsidy control framework and that the Competition and Markets Authority would be best to take on the role of State aid regulator.³⁷

Furthermore, in the White Paper presented to the Parliament, *The future relationship between the United Kingdom and the European Union* published on 12 July 2018,³⁸ it was held that the United Kingdom has been a leading advocate of the development of the EU State aid and competition regime, and has much to gain from maintaining discipline on subsidies and anti-competitive practices.³⁹ This paper sets out that the United Kingdom's proposals include committing to a common rulebook on State aid, to

34 Available at <https://ec.europa.eu/commission/publications/draft-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community-0_en>, accessed 21 February 2019.

35 Please note that Article 9 in the final Withdrawal Agreement (WA) no longer refers to State aid.

36 House of Lords, European Union Committee, Brexit: competition and State aid, 2 February 2018. Available at <<https://publications.parliament.uk/pa/ld201719/ldselect/lducom/67/67.pdf>>, accessed 21 February 2019.

37 Available at <http://data.parliament.uk/DepositedPapers/Files/DEP2018-0337/280318_-_Letter_Andrew_Griffiths_to_Rt_Hon_Lord_Whitty.pdf>, accessed 21 February 2019.

38 See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf>, accessed 21 February 2019.

39 Her Majesty's Government, 'The future relationship between the United Kingdom and the European Union, Presented to Parliament by the Prime Minister by Command of Her Majesty', July 2018, point 106.

be enforced and supervised in the UK by the Competition and Markets Authority.⁴⁰ What is also notable, in the context of the recent tax ruling cases, is that it is stated:

The UK's proposal for its future economic partnership with the EU would not fetter its sovereign discretion on tax, including to set direct or indirect tax rates, and to set its own minimum tax rates.⁴¹

Consequently, all the indicators pointed to the United Kingdom abandoning EU State aid rules in time and adopting its own domestic State aid regime, to be enforced by a national authority, the Competition and Markets Authority.

On 14 November 2018, the negotiators from the EU and the United Kingdom finalised the Agreement on the withdrawal of the UK from the EU, which shall be ratified by both the UK and the other 27 Member States.⁴² Scholars have put a lot of emphasis on the extent of the cooperation between the EU and the UK laid down in the Withdrawal Agreement.⁴³ The Withdrawal Agreement maintains the fundamental essence of State aid rules and foresees provisions to facilitate a consistent interpretation and the finding of amicable solutions to divergences. Particularly remarkable is Article 127 which provides that all EU law continues to have effect in the UK. This means that there will be no change at all in the State aid rules during the transition period, save — as some scholars have pointed out —⁴⁴ that the UK will lose its vote in any State aid legislation or decision-making by the Council.

Regarding the institutional set up, Article 93 extends the powers of the Commission for four years after the end of the transitional period. This implies that the Commission will not only be competent to assess State aid procedures initiated before the end of the four-year period which corresponds to 2024, but will also be competent to initiate the formal investigation procedure regarding any measure until that date. Its competence is further maintained for cases for as long as the legal options are not exhausted.

In line with Article 12 of the Protocol on Ireland and Northern Ireland, EU State aid will apply to the UK and to trade between the EU and the UK. Furthermore, the State aid provisions set out in Part Four of Annex 4 apply to measures affecting trade in goods between Great Britain and the EU.

Part 4 of Annex 4 of the Protocol is devoted exclusively to State aid and cooperation in enforcing State aid rules. Article 10 imposes an obligation on the Commission and the CMA, the authority responsible for enforcing the State aid rules,⁴⁵ to cooperate in order to ensure 'consistent surveillance' of State aid throughout the single customs territory. This cooperation will consist of an exchange of information on the application and interpretation of EU State aid law, on individual cases and on the opening of investigations. In addition, the UK authority will have to consult the Commission before adopting a decision and will have to take 'utmost account' of the Commission's opinion.

The interpretation and enforcement of State aid law will be subject to the jurisdiction of the Court of Justice. However, Article 11 requires the UK Courts to enforce the standstill provision in Article 108(3) TFEU, to review the CMA's decisions, to enforce those decisions and penalise non-compliance and to award damages for breaches of Article 108(3).

Last but not least, Article 169 of the Withdrawal Agreement foresees the establishment of a Joint Committee to oversee the application of the Agreement and resolve disputes. Article 13 of the Annex allows the EU to bring matters before the Joint Committee in case the implementation of State aid rules by the UK undermines 'equal conditions' of competition. It is worth noting that if no agreement is possible in the Joint Committee, an arbitration panel will have to be set up in accordance with Article 171 of the Agreement. EU law will continue to prevail but the decisions of the panel will be binding on both the EU and UK.⁴⁶

An agreement on a future relationship with the EU can only be concluded once the UK has become

40 *ibid* point 108.

41 *ibid* point 112.

42 <https://www.consilium.europa.eu/media/37095/draft_withdrawal_agreement_incl_art132.pdf>, accessed 21 February 2019.

43 See P Nicolaidis <<http://www.stateaidhub.eu/blogs/stateaiduncovered/post/9362>>, accessed 21 February 2019.

44 See G Peretz <<https://uksala.org/state-aid-and-the-withdrawal-agreement-key-points/>>, accessed 21 February 2019.

45 See G Peretz in <<https://uksala.org/state-aid-and-the-withdrawal-agreement-key-points/>> who remarks a considerable constitutional innovation in the powers granted to the CMA to consider an act adopted by Parliament as unlawful (accessed 21 February 2019.).

46 See P Nicolaidis <<http://www.stateaidhub.eu/blogs/stateaiduncovered/post/9362>>, accessed 21 February 2019.

a third country.⁴⁷ However, Article 50 of the Treaty on European Union requires that the framework for the future relationship with the Union is taken into account in the agreement setting out the arrangements for the withdrawal. In this context it is important to refer to the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom that has been approved by the European Council on 25 November 2018. According to the wording of the Political Declaration,

Competition must be open and fair. Provisions to ensure this should cover State aid, competition, social and employment standards, environmental standards, climate change and relevant tax matters, building on the level playing field arrangements provided for in the Withdrawal Agreement and commensurate with the overall economic relationship.

How this declaration will materialise into concrete provisions remains to be seen. Only time will tell how

this system will be designed and how the systems will be integrated and interplay, in particular in the specific case of Ireland and Northern Ireland.

V. The Unknowns and the Future of State aid Control

Notwithstanding the success of the EEA Agreement in general and the application of State aid rules throughout the EEA in particular, which has been of the essence in ensuring a level playing field amongst undertakings in light of Brexit, some statements from government officials of the EEA EFTA Member States and others deserve attention. Former Norwegian Minister of EEA and EU Affairs, in a speech, favoured the EEA cooperation. However, she mentioned that some want to replace the EEA Agreement with a closer free-trade agreement following Brexit, in order to take back control of matters currently decided within the EEA framework.⁴⁸

According to some reports, Norway is following the Brexit progress closely to ensure that the United Kingdom will not be given a more favourable deal.⁴⁹ In the same vein, it has been reported that the prime minister of Liechtenstein has stated that the United Kingdom should not get a better deal with the EU than non-members who went to the effort of obtaining access to the single market.⁵⁰ Moreover, the Icelandic parliament commissioned a report relating to the advantages and disadvantages of the EEA cooperation, with specific reference to the challenges of the future, the most prominent one being Brexit.⁵¹

The discussions regarding Brexit have opened up a further debate about the EEA and the incorporation of EU legislation into the legal orders of the three EFTA EEA Member States. In particular, reference should be made to the incorporation of the third energy package in the EEA Agreement. The EEA Joint Committee adopted the third energy package,⁵² but the three EEA EFTA States indicated constitutional requirements pursuant to Article 103 of the EEA Agreement implying that it cannot be implemented before all of them have stated that the constitutional requirements have been met. When this article was written, both Liechtenstein and Norway have done so. In the case of Norway, this only happened after a debate relating to the sovereignty of the State in relation to the transfer of powers to the Agency for the Cooperation of Energy Regulators (ACER).⁵³

47 See Explanatory Memorandum Proposal for a Council Decision on the conclusion of the Withdrawal Agreement. Available under <https://ec.europa.eu/commission/sites/beta-political/files/proposal_for_a_council_decision_on_the_conclusion_of_the_wa_.pdf>, accessed 21 February 2019.

48 Speech delivered on 9 November 2017 by former Minister of EEA and EU Affairs Marit Berger Røsland. Available at <https://www.regjeringen.no/en/aktuelt/statement_iiea/id2578433/>, accessed 21 February 2019.

49 See for instance <<https://www.theguardian.com/politics/2018/jan/15/norway-may-rip-up-eu-deal-over-uk-brexite-demands>>, <<https://www.abcnyheter.no/nyheter/2018/01/15/195363618/guardian-norsk-press-skaper-problemer-britene-under-brexite-forhandlingene->> and <<https://www.abcnyheter.no/nyheter/politikk/2018/04/09/195386409/heidi-nordby-lunde-h-advarer-mot-god-brexite-avtale-britene>>, accessed 21 February 2019.

50 See for instance <<https://www.bloomberg.com/news/articles/2017-05-19/liechtenstein-tells-may-she-can-t-be-better-off-than-eu-allies>>, accessed 21 February 2019.

51 A request for a report dated 28 March 2018. Available at <<http://www.athingis.is/altext/148/s/0688.html>>, accessed 21 February 2019.

52 See Decision of the Joint Committee No. 93/2017. Available at <<http://www.efta.int/media/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2017%20-%20English/093-2017.pdf>>. See also <<http://www.efta.int/EEA/news/EEA-Joint-Committee-adopts-Third-Energy-Package-502509>>, accessed 21 February 2019.

53 See for instance <<https://www.abcnyheter.no/nyheter/politikk/2018/03/07/195377980/eus-energi-byra-er-mer-enn-lite-inngripende>> and <<https://www.aftenposten.no/mening/kronikk/i/4d0W5g/Grunnloven-hindrer-en-opplyst-offentlig-samtale-om-EOS-Fredriksen-Holmoyvik-Graver-og-Smith>>. See also <<http://www.ruv.is/frett/aetla-i-mal-vegna-thridja-orkupakkans>>, 21 February 2019.

A similar discussion took place in Iceland,⁵⁴ which was a bit nuanced as Iceland does not have an interconnection to any other country. Moreover, the adoption of the new General Data Protection Regulation has been thoroughly debated due to the extension of the EEA cooperation as it gives EU institutions more power than originally foreseen by the EEA Agreement.⁵⁵

The current Minister of Finance and Economic Affairs in Iceland (and the Former Prime Minister) recently stated that it is necessary to evaluate the situation of the EEA EFTA States in the EU cooperation and that Iceland is more often under increased power of the EU when implementing new EU law which contradicts the two-pillar structure of the EEA Agreement.⁵⁶

The question unavoidably arises as to whether the continuation of the EEA Agreement and the application of State aid rules are at stake and its future jeopardised.

Regarding the future of the State aid discipline, as mentioned above in Section 2.3, the EEA Agreement builds upon the principle of homogeneity to ensure the uniform interpretation and application of the rules both in the EU and the EEA pillar. To date, no significant differences could be identified. This was due not only to the existence of the relevant administrative, judicial and political mechanisms enshrined in the Agreement but also to the political will to cooperate and existing in both pillars to ensure consistency. It is questionable whether this necessary determination to construct together will exist in the future and whether there will be three different actors that may influence the fate of State aid control, namely the EU and the EEA institutions together (or not) with those to be established in the UK. Should a consistent application and interpretation of State aid rules not be ensured, the existence of a uniform State aid control mechanism will be deprived of meaning and the implementation of the internal market and a trade space with fair competition conditions jeopardised.

VI. Conclusion

It is foreseeable that Brexit will have major implications for the UK, even if the membership to the Union were to be replaced in a medium-term perspective by an alternative such as the EEA Agreement. It is also foreseeable that Brexit will have implications for the European Union and the EEA. To what extent, it is impossible to predict at this time.

These are times of turmoil – as often in history and law. The discussions relating to the abandonment of the EEA and the EU that the heated Brexit debates have sparked in several countries are not to be taken lightly.

This article can therefore only conclude with a plaidoyer to remember that those agreements have allowed European countries to participate in the internal market, benefitted individuals and companies in ways they might now take for granted, and helped to construct together a well-functioning, stable and prosperous economic community (and beyond) based on the respect of fair competition rules.

The unique State aid control mechanism enacted in the Treaty establishing the European Economic Community in 1957, which has been maintained throughout different reforms and enlargements and which has been extremely successfully transposed in its entirety to the whole European Economic Area, has ensured an unprecedented level playing field. The objective for the future of State aid control can therefore only be the continuation of such a success story, with or without mirroring rules being applied in the UK after Brexit...

54 See for instance <https://www.mbl.is/frettir/innlent/2018/04/08/miklar_ahyggjur_af_orkuloggjofinni/>, <<http://www.klassekampen.no/article/20180403/ARTICLE/180409998>>, accessed 21 February 2019.

55 See for instance <<http://www.visir.is/g/2018180619575/framsal-valds-til-stofnana-esb-a-morkum-stjornarskrarinnar->>, accessed 21 February 2019.

56 See for instance <https://www.mbl.is/frettir/innlent/2018/02/12/vegid_ad_grunnstodum_ees_samningsins/>, <https://www.mbl.is/frettir/innlent/2018/04/02/noregur_hunsad_hagsmuni_islands/> and <https://www.mbl.is/frettir/innlent/2018/04/23/alita_sjalfstaedid_vera_vesen/>, accessed 21 February 2019.