

# Preserving Britain's place in the EEA

Prime minister must bolster statement to European signatories

by Lord (David) Owen in London

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On 25 November in The Sunday Times, Prime Minister Theresa May wrote a letter to the country and former Prime Minister Tony Blair wrote to the European Union. In the newspaper's 2 December edition, I published [a letter to all members of the UK parliament](#). In this article I present an explanatory note setting out in greater detail the circumstances that should be considered in relation to the UK's role in the European Economic Area.

The prime minister's letters to all 31 contracting parties to the agreement on the EEA would need to be more detailed than her statement to the House of Commons. They should cover the following points:

- The UK reaffirms its full commitment to the Article 1(1) aim of the EEA Agreement – 'to promote a continuous and balanced strengthening of trade and economic relations between the contracting parties with equal conditions of competition' – and proposes to continue its membership of the EEA from 29 March 2019;
- The UK assures all other parties that it will continue to perform its post-Brexit obligations under the agreement, recognising that these obligations will expand in scope as competences currently lying with the EU are transferred to the UK (a consequence of the transfer of sovereignty that Brexit entails);
- The UK reaffirms its commitment to the existing territorial scope of the application of the EEA Agreement to the territories for which it has responsibility;
- The UK expects all other parties to the agreement to continue their own obligations to the UK under the treaty, again recognising that, for the EU, these will be diminished by the transfer of competences after Brexit;
- The UK will be bound by obligations equivalent to those of Iceland, Liechtenstein and Norway;
- The UK notes that such change of status occurred, with relative ease, when Austria, Finland and Sweden ceased to be 'European Free Trade Association states' and became members of the EU in 1995;
- In the event of any dispute the UK will seek arbitration under international law as is provided by the Permanent Court of Arbitration;
- The UK formally give notice that it reserves its EEA Agreement rights under international law, recognising that, after 29 March 2019, it will be international law that will be relevant for settling any disputes.

The UK intends to remain a member of the EEA on the same basis as Norway, Iceland and Liechtenstein. There will be a deep free trade agreement in place on 30 March 2019 and no need to take recourse to World Trade Organisation tariff schedules for intra-EEA trade. Irish border issues will be greatly diminished by virtue of the regulatory harmonisation that the continued EEA membership will bring and any problems over cross-border customs duties will be markedly reduced.

Continuing in the EEA on this basis could unite many different viewpoints in parliament because, first, it is an alternative approach in which the UK would have significant control, a characteristic that follows from the facts that the UK is currently a party to the EEA Agreement and has not instigated Article 127 of said agreement to quit, and no other party has given notice that they would try to force a UK exit. Second, this approach leaves longer-term trade policy issues to be settled later. It would require a minor amendment to the European Union (Withdrawal) Act 2018.

The Permanent Court of Arbitration is an institution that the Withdrawal Act anticipated might play a role in the arbitration arrangements that it envisages for the transition. It is referenced numerous times in the Withdrawal Act, so there would be nothing novel in suggesting its relevance for arbitration over EEA membership.

The UK would not be asking anything more from the EU than it is entitled to under the provisions of the EEA Agreement. Refusal of consent would, in the circumstances, be deeply damaging to Article 1(1) of the agreement. There is nothing to stop the UK doing what Norway has sometimes done by paying extra for

greater co-operation. The EEA Agreement is, in reality, extremely flexible in accommodating side-deals between its parties. Contrary to the myths that it establishes a rigid, one-size-fits-all set of rules, its protocols and annexes contain all manner of bespoke adjustments.

It is a feature of the EEA that its non-EU member states do not participate in all aspects of the EU's internal market. Parts that are absent include the EU customs union, agriculture and fisheries.

The UK, like the three other non-EU members of the EEA, would not be required to be part of the EU customs union. At the same time, there is nothing to stop any of them doing so should they wish. Options are left open. In practice the three states have chosen to pursue free trade agreements, both through the European Free Trade Association and on their own, individual accounts. They have judged that option the more favourable to their interests. There are major differences of view on how to use this available option, and there should be a much wider consensus before the UK does.

Any customs arrangement will take time because of the need to establish a comprehensive rules-of-origin system, not for want of appropriate technologies. The EU might offer to retain its proposed transitional arrangements in the Withdrawal Act until end-2020. Since the substance of the relevant matters has already been agreed, such transitional arrangements could be contained in UK-specific protocols to the EEA Agreement or any UK-EU withdrawal understanding that needs legislation. The UK would pay for this, bringing the total exit bill closer to the £39bn in the Withdrawal Act.

Under these specific EEA arrangements, there would be a considerable easing of the disruption that might otherwise occur from leaving the EU without an agreement. The major issue of trade arrangements, including the relevant regulatory infrastructure supporting trade, would be settled at the outset, and the UK would continue to see an EEA-EU border in Northern Ireland with sporadic checks away from that border focused particularly on those commodities for which EU and UK tariff differentials were high enough to attract significant attempts at smuggling. The UK would be in a much-improved position, too, when seeking to agree mutually beneficial arrangements on this and other important matters.

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